SUPREME COURT RECORDS & BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
317 U.S. 1	Ex Parte Quirin	Orig.	5
49	Braverman v. U.S.	43,44	13
56, 710	U.S. v. Callahan Walker	65	4
61	U.S. v. Rice	31	3
69	Ex Parte Kawato	10,Orig.	1
78, 710	Marine Properties v. Manufacturers Trust Co.	24	7
88	Warren-Bradshaw Co. v. Hall	21	5
95	Riggs v. del Drago	30	8
102	Helvering v. Ohio Leather Co.	40-42	8
111	Wickard v. Filburn	59	8
135, 712	Hardinsburg State Bank v. Brown	23	4
144, 714	Pfister v. Illinois Finance Corp.	26-27	12
154, 602, 711	Helvering v. Stuart	48	4
154, 602, 711	Helvering v. Stuart	49	3
173	Sola Electric Co. v. Jefferson Electric Co.	45	5
178, 712	Mangus v. Miller	74	3

SUPREME COURT RECORDS & BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
317 U.S. 188	Ettelson v. Metropolitan Life Ins. Co.	70	3
192, 601, 713	Miller v. U.S.	76	5
200	U.S. v. Wayne Pump Co.	81-82	6
211, 608, 712	Albin v. Cowing Joint Co.	234	3
213	Pyle v. Kansas	50	2
217, 602	Fisher v. Whiton	85	5
222, 706	Mother Lode Co. v. Commissioner	94	5
228	United Carbon Co. v. Binney & Smith	71	14
239	Garrett v. Moore-McCormack Co.	67	3
249, 713	Davis v. Dept. of Labor & Industries	86	3
269, 605	Adams v. U.S. ex rel McCann	79	5
287	Williams v. North Carolina	29	4
325, 608	Wragg v. Federal Land Bank	172	4
329, 607	Detroit Bank v. U.S.	156	12
338	Michigan v. U.S.	214	16
341	Parker v. Brown	46	12

SUPREME COURT RECORDS AND BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
317 U.S. 369	U.S. v. Miller	78	11
383, 607	Marshall v. Pletz	93	7
395, 609	Clyde-Mallory Lines v. Eglantine	265	4
399, 612	Kieselbach v. Comm. of Int. Rev.	184	4
406, 605	Coryell v. Phipps	246	61
412 608	Pendergast v. U.S.	183,186,187	26
424	U.S. v. Monia	248	3
447, 609	Harris v. Zion's Savings Bank Co.	268	3
456	Public Utilities Comm. v. United Gas	87	6
476, 612	Harrison v. Northern Trust Co.	103	4
481, 612	Lilly v. Grand Trunk Western RR Co.	124	7
492, 610	Spies v. U.S.	278	9
501, 607	Endicott Johnson Corp. v. Perkins	142	9
519, 613	American Medical Assn. v. U.S.	201-202	35
537, 613	U.S. ex rel Marcus v. Hess	173	16

SUPREME COURT RECORDS AND BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
317 U.S. 562, 613	U.S. ex rel Ostrager v. Contractors	236	3
564, 615	Walling v. Jacksonville Paper Co.	336	14
572	Higgins v. Carr Brothers Co.	97	4
575, 609	Brady v. Roosevelt SS Co.	269	6

SUPREME COURT RECORDS AND BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
318 U.S. 1	Terminal RR Assn. v. Bro. RR Trainmen	218	11
9	Nat'l Lab. Rel. Bd. v. I & M Electric	73	18
36	O'Donnell v. Great Lakes Dredge Co.	73	3
50	In Re Bradley	473	5
54	Tiller v. Atlantic Coast Line RR Co.	296	4
73, 800	Ziffrin, Inc. v. U.S.	245	14
80	Securities & Exchange v. Chenery Corp.	254	6
101	Jerome v. U.S.	325	3
109, 800	Palmer v. Hoffman	300	11
120	U.S. v. Brooks-Callaway Co.	366	3
125	Overstreet v. North Shore Corp.	284	4
133, 801	C. J. Hendry Co. v. Moore	60	6
163	R.F.C. v. Bankers Trust Co.	387-388	8
176	Smith v. Shaughnessy	429	3
184	Robinette v. Helvering et al	499-500	3
189, 801	Johnson v. U.S.	273	7
203, 800	Leishman v. Associated Electric Co.	332	11

SUPREME COURT RECORDS & BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
318 U.S. 206	U.S. v. Oklahoma Gas & Electric Co.	171	3
218	Fed. Security Adm'r. v. Quaker Oats	424	14
236	Viereck v. U.S.	458	12
261	Penn Dairies v. Milk Control Comm.	399	5
285, 801	Pacific Coast, Dairy v. Dept. of Agric.	275	6
306	Helvering v. Sabine Trans. Co.	518	3
313	Hoopeston Canning Co. v. Cullen	358	11
322	Helvering v. American Dental Co.	303	3
332	McNabb v. U.S.	25	3
350	Anderson v. U.S.	10	19
357	Maricopa County v. Valley Bank	449	11
363, 744	Clearfield Trust Co. v. U.S.	490	3
371	Helvering v. Griffiths	467	4
413	Jamison v. Texas	558	3
418	Largent v. Texas	559	3
423	Choctaw Nation v. U.S.	80	5
434	Corn Exchange Bank v. Klauder	452	3
448, 803	In Re Western Pacific RR Corp. et al	7,8,20, 33,61	69

SUPREME COURT RECORDS AND BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
318 U.S. 515	Emil v. Hanley	551	3
523	Group of Investors v. Milwaukee RR Co. et al	11-19,32	56
578	Ex Parte Peru	13,Orig.	5
604	Helvering v. Sprouse Strassburger v. Commissioner	22 66	7
608	Fidelity Assurance Assn. v. Sims	319	42
622	Myers v. Matley	540	5
629	Creek Nation v. U.S. et al	321-322	5
643	Fisher Co. v. Witmark & Sons	327	6
660	DeZon v. American President Lines	436	3
675	Illinois Commerce Comm. v. Thomson	178	9
693	Helvering v. Chicago Stock Yards Co.	488	24
702	U.S. v. Lepowitch	629	3
705	Board of Co. Comm'rs. v. Seber	556	7
724	Aguilar v. Standard Oil Co. Waterman SS Corp. v. Jones	454 582	6

SUPREME COURT RECORDS AND BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #
319 U.S. 1, 729, 782	Barringer & Co. v. U.S.	520
21	Roche v. Evaporated Milk Assn.	584
44	Southland Co. v. Bayley	581
	Richardson v. James Gibbons Co.	725
50	Lab. Bd. v. Southern Bell Telephone et al	460-461
61	Jersey Central Power & Light Co. v. Federal Power Comm. et al	299,329
88	Noble v. U.S.	511
94	Central Hanover Bk. & Trust v. Kelly	659
98	Detroit Edison Co. v. Commissioner	675
105	Murdock v. Pennsylvania et al	480-487
141	Martin v. Struthers	238
157, 782	Douglas v. Jeannette	450
182	Lockerty v. Phillips	934
190	National Broadcasting Co. v. U.S.	554
	Columbia Broadcasting System v. U.S.	555
239	Communications Comm. v. N.B.C.	585
266	U.S. v. Powelson	3
293	Great Lakes Co. v. Huffman	849
306	Standard Dredging Co. v. Murphy	722
	International Elevating Co. v. Murphy	723

SUPREME COURT RECORDS & BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
319 U.S. 312	Adams v. U.S.	889	3
315	Burford v. Sun Oil et	495-496	14
348	Hastings v. Selby Oil Co.	528	5
350	Bailey v. Central Vermont Ry.	640	3
359	Altvater v. Freeman	696	25
372	Galloway v. U.S.	553	5
427, 732	Buchalter v. New York et al	606,610,619	104
432	Korematsu v. U.S.	912	2
436	Moline Properties v. Commissioner	660	5
441	Mayo v. U.S.	726	6
448	Freeman v. Bee Machine Co.	707	5
463	Tot v. U.S. U.S. v. Delia	569 636	8
474	Mahnomen v. U.S.	684	4
484	Bartchy v. U.S.	762	3
491	McLeod v. Threlkeld	787	2
503	U.S. v. Johnson et al	4-5	31
521	U.S. v. Belt	919	2
523	Virginian Hotel Co. v. Helvering	766	4
533	Virginia Electric Co, v. N.L.R.B.	709	5
551	I.C.C. v. Columbus & Greenville Ry.	628	7

SUPREME COURT RECORDS & BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
319 U.S. 561	Boone v. Lightner	698	6
583	Taylor v. Mississippi	826	21
	Benoit v. Mississippi	827	
	Cummings v. Mississippi	828	
590	Interstate Transit Lines v. Comm. of Int. Rev.	552	6
598	Oklahoma Tax Comm. v. U.S.	623-625	9
624	West Virginia State Board of Education v. Barnette	591	8
671	I.C.C. v. Inland Waterways Corp.	175	47
703	Direct Sales Co. v. U.S.	593	8
715	Owens v. Union Pacific RR Co.	580	7

SUPREME COURT RECORDS & BRIEFS
1942 FULL OPINIONS

CITATION	TITLE	CASE #	# CARD
320 U.S. 1, 809	Marconi Wireless Co. v. U.S. et al	369,373	107
81	U.S. v. Hirabayashi	870	12
115	Yasui v. U.S.	871	7
118, 807	Schneiderman v. U.S.	2	23

BLANK PAGE

163

IN THE SUPREME COURT OF THE UNITED STATES

July, Special Term, 1942 No. 537028 on. L. L. C.

No._____

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMAN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

United States Ex Rel., Ernest Peter Burger, Et Al., Petitioners for Writs of Certiorari

v.

Brig. Gen. Albert L. Cox, U.S.A., Provost Marshal of the Military District of Washington, Respondent

---

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to bring up to this court this case which is pending in the United States Court of Appeals for the District of Columbia, before judgment is given in that court.

BLANK PAGE

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia has not yet given its judgment in this case.

The orders of the United States District Court for the District of Columbia have not yet been reported and for convenience a copy is attached hereto, and marked Exhibit I.*

BASIS OF JURISDICTION

Jurisdiction is invoked under section 240 (a) of the Judicial Code, 28 U.S.C., section 347, as amended by the Act of February 13, 1925, 43 Stat. 938. The orders of the United States District Court for the District of Columbia were filed July 28, 1942, and notices of appeal to the United States Court of Appeals for the District of Columbia were filed on July , 1942. It is believed that the

---

*Although the petitions of the seven petitioners for writs of habeas corpus were heard together and decided similarly by the District Court, they were not formally consolidated in that Court. As a result, seven orders were entered. Since they are identical except for the names of the respective petitioners, a copy of only one has been attached hereto. After the orders were entered in the District Court, the petitions were consolidated by stipulation of counsel. The petitions are hereafter referred to as comprising a single consolidated case.

BLANK PAGE

public interest will be served by prompt settlement in this court of the questions involved, and that under its Rule 39 this court may properly assume jurisdiction of this case before judgment is given by the United States Court of Appeals for the District of Columbia.

QUESTIONS PRESENTED

A fundamental question presented in this petition is whether the President of the United States may provide for the trial by military commission of offenses which are (with the exception of the charge of spying covered by Article of War 82) cognizable in the district or other appropriate courts of the United States, at a time when such courts of the United States are open and functioning regularly.

Another fundamental question presented in this petition is whether the President of the United States by proclamation may deny to certain persons, and in particular to the petitioners herein, access to the courts of the United States or of its states, territories and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

A subsidiary question presented is whether the Military Commission may try those of the petitioners herein who are citizens of the German Reich for violations of Article of War 81, which Article of War (in addition to being covered by criminal statutes of the United States) is applicable only to citizens of the United States.

BLANK PAGE

Another subsidiary question is whether any jurisdiction is conferred upon the Military Commission and whether the order of the President of the United States is in any way validated by Article of War 82 relating to spies, since no evidence was introduced at the hearing before the Military Commission tending to establish certain of the necessary elements of the charge of spying, including the element of intent to communicate military information to any enemy of the United States, and probably including the element of passing through the zone of military operations as that term is defined by military and international law.

Another question is whether any jurisdiction is conferred upon the Military Commission and whether the order of the President of the United States is in any way validated by the laws of war, since no evidence to establish certain of the necessary elements of the charge of spying, including the element of intent to communicate military information to any enemy of the United States, and probably including the element of passing through the zone of military operations as that term is defined by military and international law.

Another question is whether any jurisdiction is conferred upon the Military Commission and whether the order of the President of the United States is in any way validated by the charge of conspiracy, since a charge of conspiracy to commit certain alleged offenses cannot confer jurisdiction upon a tribunal which does not have jurisdiction to try the charges themselves.

BLANK PAGE

SUMMARY STATEMENT

The essential facts are set out in the petitions filed in the United States District Court for the District of Columbia for writs of habeas corpus.

The petitioners are being detained and imprisoned by color of the authority of the United States in the custody of Brigadier General Albert L. Cox, Provost Marshal of the United States Army, Military District of Washington, at a special section at the District of Columbia jail in the District of Columbia. The causes of such detention and imprisonment are a certain order of the President of the United States, dated July 2, 1942, a copy of which is attached as Exhibit A to the petitions filed in the District Court for writs of habeas corpus; a proclamation of the President of the United States, dated July 2, 1942, a copy of which is attached as Exhibit B to the said petitions; a memorandum or order of the Honorable Francis Biddle, Attorney General of the United States, dated July 3, 1942, a copy of which is attached as Exhibit C to the said petitions; and a certain memorandum or order of Major General Ulio, the Adjutant General, a copy of which is attached as Exhibit D to the said petitions.

Assuming to act in accordance with the orders, memoranda and proclamation aforesaid, the Provost Marshal of the Washington Military District has taken the petitioners into custody and is still detaining them, and Major General Frank R. McCoy, Major General Blanton Winship,

BLANK PAGE

Major General Walter S. Grant, Major General Lorenzo D. Gasser, Brigadier General Guy Q. Henry, Brigadier General John T. Lewis and Brigadier General John T. Kennedy, assuming to act as a Military Commission, have assumed to conduct a hearing or trial on certain charges or specifications, a copy of which is attached as Exhibit E to the petitions for writs of habeas corpus.

The petitioners filed timely applications in the District Court of the United States for the District of Columbia for leave to file petitions for writs of habeas corpus directed to the aforesaid Brigadier General Albert L. Cox, commanding him to produce them before that court and to do what that court should order concerning their detention and restraint. These applications were denied by a Justice of the District Court of the United States for the District of Columbia in orders dated July 28, 1942. On July , 1942, notices of appeal from the said orders were duly filed by the petitioners in the Court of Appeals for the District of Columbia. By stipulation the applications of the seven petitioners herein were consolidated in that court. No judgment or order has been entered as yet by the Court of Appeals for the District of Columbia in connection with the appeal pending before that court.

REASON FOR GRANTING THE PETITION

These proceedings test the power of the President of the United States to provide for the trial by military commission of offenses cognizable in the courts

BLANK PAGE

of the United States at a time when those courts are open and functioning regularly and to deny to the petitioners access to those courts. It is believed that the President has no such power, and that all acts purportedly in pursuance of such power are unconstitutional and in conflict with applicable decisions of this court. Upon the decision of the questions raised by this petition depend the civil liberties in wartime of aliens and citizens alike. It is, therefore, urged that this court should take jurisdiction of the case.

It is further urged that this court, as permitted by Section 240 (a) of the Judicial Code, 28 U.S.C., section 347, as amended by the Act of February 13, 1925, 43 Stat. 938, and pursuant to Rule 39 of this court, should bring up this case on a writ of certiorari before judgment is given in the United States Court of Appeals in the District of Columbia, because the public interest will be promoted by prompt settlement in this court of the questions involved.

Wherefore your petitioners pray that a writ of certiorari issue to bring up to this court this case, before judgment is given in the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

_____

_____

Counsel for Petitioners

BLANK PAGE

Service of a copy of this petition on July 31, 1942, is hereby acknowledged and service of a copy of the record in the courts below is hereby waived. Respondent also waives his right to twenty day's time in which to file a brief in opposition to this petition; and has no objection to the immediate distribution of the papers on this petition to the members of the Supreme Court for action thereon.

_____

_____

Counsel for Respondent

BLANK PAGE

EXHIBIT I.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE APPLICATION OF

HERMANN OTTO NEUBAUER,

Petitioner,

FOR A WRIT OF HABEAS CORPUS

O R D E R

The petitioner, Hermann Otto Neubauer, asks leave to file a petition for a writ of habeas corpus by his counsel. It is conceded by petitioner's counsel that petitioner landed on the coast of the United States in June, 1942, from a German submarine, with explosives, which he was instructed by a German officer to use for the purpose of committing sabotage on certain American industries. In view of this statement of fact, it seems clear that the petitioner comes within that category of subjects, citizens or residents of a nation at war with the United States, who, by a proclamation of the President, dated July 2, 1942, are not privileged to seek any remedy or maintain any proceeding in the courts of the United States.

I do not consider that Ex Parte Milligan, 4 Wall. 2, is controlling in the circumstances of this petitioner. The application of the petitioner must, therefore, be denied.

Dated this 28th day of July, 1942.

Justice.

BLANK PAGE

EXHIBIT I.

"In deference to the Commission and in order that we may not waive for our clients any rights which may belong to them, we desire to state that, in our opinion, the order of the President of the United States creating this Court is invalid and unconstitutional. I do not think it necessary or appropriate to argue that question unless I am so requested.

"It is perhaps sufficient to state that our view is based, first, on the fact that the civil courts are open in the territory in which we are now located and that, in our opinion, there are civil statutes governing the matters to be investigated.

"In the second place, we question the jurisdiction of any court except a civil court over the persons of these defendants.

"In the third place, we think that the order itself violates in several specific particulars congressional enactments as reflected in the Articles of War."

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 29 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

JULY, SPECIAL TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMAN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

NOS.

UNITED STATES EX REL., ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

BRIEF IN SUPPORT OF PETITIONS FOR WRIT OF HABEAS CORPUS

CASSIUS M. DOWELL, Col., U. S. A.,
KENNETH C. ROYALL, Col., A. U. S.,
Attorneys for Petitioners.

BLANK PAGE

INDEX

	Page
Jurisdiction	1
Questions Presented	2
Orders Involved	2
Facts	2
Argument:	
I. Citizenship of Haupt	12
II. Right of Enemy Aliens to Institute These Actions	15
III. Jurisdiction of a Military Commission Over the Offenses Charged	20
IV. Jurisdiction of a Military Commission Over Persons of Petitioners	31
V. Invalidity of Proclamation	36
VI. Provisions of Presidential Order in Conflict with Express Statutes	40
VII. Delegation of Rule Making Power to Commission	51
VIII. Rules Made by the Commission	53
IX. Ex Parte Milligan and Other Cases	55
X. Conclusion	63
Appendix	65

TABLE OF CASES

Burgess v. *Salmon*, 97 U. S. 384	39
Caldwell v. *Parker*, 252 U. S. 376	62
Carter v. *Carter Coal Co.*, 298 U. S. 330	62
Ex Parte Benedict, 3 Fed. Cas. No. 1292	38
Ex Parte Bollman, 4 Cranch 101	38
Ex Parte Colona, 86 Law Ed. 337	16
Ex Parte Merryman, 17 Fed. Cas. 114	38
Ex Parte Milligan, 4 Wallace (U. S.) 2	16, 18, 31, 36
Ex Parte Orozco, 201 F. 106	19
Ex Parte Risse, 257 F. 102	19
Home Building and Loan Assn. v. *Blaisdell*, 290 U. S. 398	62
Kahn v. *Anderson*, 255 U. S. 1	62
Kaufman v. *Eisenberg*, 32 N. Y. S. (20) 450, 454	17
McCall v. *McDowell*, 14 Fed. Cas. No. 8673	38
Sterling v. *Constantine*, 287 U. S. 378	35, 62
Thompson v. *Utah*, 170 U. S. 343	39

CONSTITUTION

Article I, Section 8, Clause 14	21
Article III, Section 2, Clause 3	36
Amendment 5	21
Amendment 6	36

MISCELLANEOUS CITATIONS

	Page
2 Amer. Juris. 558	15
11 Amer. Juris. 158	29
12 Cal. L. Rev. (1924) 75, 178	36
Courts-Martial Manual, Pars. 30, 35, 142	24
Halleck, International Law, 3rd Edition, page 573	26
55 Harvard Law Rev. (1942) 1058, 1295–6	16, 17, 54, 55
Oppenheim, International Law, 1905 Ed. Vol. 2, pp. 60, 161	23, 26
Opinions Attorney General, Vol. 31, p. 361; p. 356	17, 22, 23, 31
Rules of Land Warfare, Par. 7, page 3; Par. 204, pp. 58, 59; Par. 209; Section 202	22, 24, 28
The Hague Convention	23
War Department, Field Service Regulations, FM 100–5, 1941	34
Wheaton, International Law, 6th Ed. Vol. 2, pp. 764, 766	23, 26, 28
Willoughby on Constitutional Law, Sec. 1014, page 1548, Section 1057	38
Winthrop on Military Law, 841	22

STATUTES CITED

Articles of War 2, 18, 38, 43, 46, 50½, 70, 81, 82	20, 27, 40, 42, 44, 46
18 U. S. Code, Sec. 1	27
50 U. S. Code 21	18
50 U. S. Code, Sec. 31–42	27
18 U. S. Code 88	29
50 U. S. Code, Sec. 101–106	27
50 U. S. Code, Ch. IV	23
50 U. S. Code, Appendix	16
4 and 5 George V, C. 29	37
5 and 6 George V, C. 8	37
10 and 11 George V, C. 55	37
2 and 3 George VI (1939), C. 62	37

In the Supreme Court of the United States

JULY, SPECIAL TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMAN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

Nos.

UNITED STATES EX REL., ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

BRIEF IN SUPPORT OF WRITS OF HABEAS CORPUS

JURISDICTION

On July 28, 1942, the petitioners presented petitions for Writ of Habeas Corpus to Justice James W. Morris, United States District Judge for the District of Columbia, and in writing asked leave to file such petitions. On said date Justice Morris

denied the application of the petitioners to file said petition. Thereupon these present petitions were filed in this Court on July 29, 1942. Jurisdiction is conferred on this Court by Article III of the Constitution and also by 28 U. S. Code, Sec. 451.

QUESTIONS PRESENTED

1. May the Petitioners (six of whom are alien enemies) maintain this proceeding for Writ of Habeas Corpus?

2. If so, are the Petitioners unlawfully restrained of their liberty?

ORDERS INVOLVED

The case involves the validity of the Order of the President of the United States, dated July 2, 1942, appointing a Military Commission for the trial of the Petitioners, and the Proclamation of the President of the United States of the same date, denying certain persons access to the Courts of the United States.

FACTS

In June, 1942, the petitioners were arrested by Agents of the Federal Bureau of Investigation (hereinafter designated F. B. I.). Some of the petitioners were arrested in New York, the others in Chicago.

At the request of said Agents each petitioner signed a "consent to remain under the continuous physical supervision of the Special Agents of F. B. I., Department of Justice, without immediate

arraignment, and at such place as may be designated by the said Agents" (Exhibit G attached to the Petition). Each petitioner also signed a consent for his residence to be searched by the Agents of the F. B. I. (Exhibit F).

Each petitioner also signed a waiver of "my right to be arraigned before a duly authorized judicial officer or magistrate and my right not to be removed from the said judicial district (in which he was taken into custody), except by virtue of a waiver of removal issued for that purpose." This waiver further provides that each petitioner does "hereby freely consent and agree that I may be forthwith removed by representatives of the Department of Justice in their discretion to any judicial district of the United States, either for the purpose of questioning or for the purpose of being held to answer any criminal charges."

On July 2, 1942, The Honorable Franklin D. Roosevelt, President and Commander in Chief of the Army and Navy, issued an order (Exhibit A) appointing a military commission to "try for offenses against the Law of War and the Articles of War" the petitioners and one other person. This order contained the following provision:

> "The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair

trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for a conviction or sentence. The record of the trial including any judgment or sentence shall be transmitted directly to me for my action thereon."

The above order provided that "The prosecution shall be conducted by the Attorney General and the Judge Advocate General," and further provided that the Commission should "meet in Washington, D. C., on July 8, 1942, or as soon thereafter as is practicable."

On July 3, 1942, Hon. Francis Biddle, Attorney General of the United States, directed a memorandum (Exhibit C) to Mr. J. Edgar Hoover, Director of F. B. I., to "turn over the custody and control" of the petitioners to the Secretary of War. On the same date, the Secretary of War through The Adjutant General issued a memorandum (Exhibit D) to the Provost Marshal, Military District of Washington, the respondent herein, directing him to "receive and keep in custody" until further orders from the F. B. I., Department of Justice, the petitioners, "prisoners to be tried before a military commission."

On July 3, 1942, Col. F. Granville Munson, of the Judge Advocate General's Department, signed

certain charges (Exhibit E) against the petitioners and one other person, which charges may be summarized as follows:

Charge I: Violation of the Law of War

Specifications 1. In that, during the month of June 1942, Edward John Kerling (and others) being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went behind such lines and defenses in civilian dress within zones of military operations and elsewhere, for the purpose of committing acts of sabotage, espionage, and other hostile acts, and, in particular, to destroy certain war industries, war utilities, and war materials within the United States.

Specification 2. In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, appeared, contrary to the law of war, behind the military and naval defenses and lines of the United States, within the zones of military operations and elsewhere, for the purpose of committing or attempting to commit sabotage, espionage, and other hostile acts, without being in the uniform

of the armed forces of the German Reich, and planned and attempted to destroy and sabotage war industries, war utilities, and war materials within the United States, and assembled together within the United States explosives, money, and other supplies in order to accomplish said purposes.

Charge II: Violation of the 81st Article of War

Specification: In that, during the month of June, 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, and without being in the uniform of the armed forces of that nation, relieved or attempted to relieve enemies of the United States with arms, ammunition, supplies, money and other things, and knowingly harbored, protected and held correspondence with and gave intelligence to enemies of the United States by entering the territorial limits of the United States, in the company of other enemies of the United States, with explosives, money and other supplies with which they relieved each other and relieved the German Reich, for the purpose of destroying and sabotaging war industries, transportation facilities or war materials of the United States, and by harboring, communicating with, and giving intelligence to each other and to other enemies of the United States in the course of such activities.

Charge III: Violation of the 82nd Article of War

Specification: In that, during the month of June 1942, Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, were, in time of war, found lurking or acting as spies in or about the fortifications, posts, and encampments of the armies of the United States and elsewhere, and secretly and covertly passed through the military and naval lines and defenses of the United States, along the Atlantic Coast, and went about, through, and behind said lines and defenses and about the fortifications, posts, and encampments of the armies of the United States, in zones of military operations and elsewhere, disguised in civilian clothes and under false names, for the purpose of committing sabotage and other hostile acts against the United States, and for the purpose of communicating intelligence relating to such sabotage and other hostile acts to each other, to the German Reich, and to other enemies of the United States, during the course of such activities and thereafter.

Charge IV: Conspiracy to Commit All of the Above Acts

Specification: In that, during the year 1942 Edward John Kerling (and others), being enemies of the United States and acting for and on behalf of the German

Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications.

The response herein makes certain statements as to the acts committed by the petitioners. It, therefore, becomes necessary for petitioners to summarize briefly certain salient facts relative to their conduct prior to arrest.

The petitioners attended a school near Berlin and received instructions and directions as to industrial sabotage of manufacturing and transportation facilities. They were directed to commit no sabotage within ninety days after their arrival in America. They received no instructions or directions relative to obtaining information of a military nature or communicating the same to Germany. They were expressly directed to go unarmed and not to kill or injure any individual.

They came to America on submarines and landed in two groups on the Long Island and the Florida coasts. They brought certain explosives which they buried on the sea shore. At the time of their arrest, they had committed no acts of sabotage, had taken no steps toward sabotage and had made no definite plans as to time and place of committing any sabotage.

The petitioners testified they did not intend to commit any acts of sabotage. In the case of two or more petitioners this testimony was definitely corroborated by other evidence produced by the prosecution. All of the petitioners deny their guilt.

The full evidence on the various Charges and Specifications and the full evidence as to the citizenship of the various petitioners appear in the Record of the alleged Commission. The petitioners will refer to this Record in the Brief and Argument to substantiate their position.

Colonel Cassius M. Dowell and Colonel Kenneth C. Royall, who were named in the President's Order as Counsel for the defendants (petitioners herein), reported for duty on the night of July 3. Upon investigation of the President's Order and Proclamation, and of the Charges and Specifications, Counsel reached the conclusion that there was a serious question as to the constitutionality and validity of the Order and Proclamation. For several days Counsel unsuccessfully sought to obtain a clarification of their Orders in the matter of their right to file a petition for a Writ of Habeas Corpus.

Such efforts, together with the interview of the prisoners and the preparation for the hearing (scheduled to begin July 8) made it impossible for petitioners' Counsel to file any petition for

Writ of Habeas Corpus before the hearing started. It is believed that Counsel for respondent will not question these facts.

When the Commission met on July 8, and before the organization thereof was completed, and before Col. Dowell and Col. Royall took any action on behalf of the prisoners, said Counsel stated (Exhibit I) to the persons named as members of the Commission that in their opinion the Order of the President creating the Commission was invalid and unconstitutional and further stated that in appearing before the Commission, Counsel did not waive any of the rights of the prisoners.

Civil courts were at that time open and functioning normally in the District of Columbia where the alleged Military Commission was assuming to act, and civil courts, both Federal and State, were at that time open and functioning normally in the states of New York and Florida, where the prisoners were charged to have committed offenses and also in each State in which any of the prisoners were arrested or detained.

The trial before the alleged Military Commission continued from July 8 through July 27, on which latter date the evidence of prosecution and defense had all been introduced and the case had been closed except for argument of counsel and action of the alleged Military Commission and of the President. It has been stipulated by Counsel

that this Court may consider the facts up to the date of this hearing and any part of the Record before the alleged Military Commission may be used as evidence in this present hearing.

Before the alleged Military Commission, the defendants (petitioners) duly requested the right to exercise one peremptory challenge, it being the intention of the defendants to challenge a specific member of the Commission. The Commission denied this right, as appears in the stipulation of the parties.

During the early part of the hearing, the Commission called attention to the provision of the President's Order to the effect that there should be admitted such evidence "as would, in the opinion of the President of the Commission, have probative value to a reasonable man." During the presentation of the prosecution's case, over objection, the Commission admitted, as against all defendants, the separate confessions of each defendant made after their apprehension. Such confessions were admitted not only on the charge of conspiracy but also on all the other charges. The Commission has formally announced that neither their findings nor their sentences nor the vote by which the sentences and findings have been determined, will be made public or will be made available to the petitioners until after submission of the matter to the President and after final action by the President.

ARGUMENT

The petitioners submit to the Court the following five propositions, to wit:

First, the petitioners, including the aliens, are entitled to maintain this present proceeding.

Second, the President's Proclamation, which assumes to deny the right of the petitioners to maintain this proceeding, is unconstitutional and invalid.

Third, the President's Order, which assumes to appoint the alleged Military Commission, is unconstitutional and invalid.

Fourth, the President's Order, relating to the alleged Military Commission, is contrary to statute and, therefore, illegal and invalid.

Fifth, the petitioners are entitled to be tried by the civil courts for any offenses which they may have committed.

The argument in support of these five propositions is presented under the ten headings set out below.

I

CITIZENSHIP OF HAUPT

Admittedly all the petitioners are citizens of the German Reich except the petitioner Haupt. Haupt came to the United States when he was five years of age; and during his minority his parents became naturalized. The petitioner Haupt contends that his citizenship, thus acquired, has not been lost in any manner. On the contrary Re-

spondent contends that Haupt has lost his citizenship. The evidence relative thereto is included in the stipulation which is a part of the record.

It will be noted that practically the sole evidence is Haupt's own statement on the stand or in his confession. From these statements it appears that in 1941, at the age of 21, Haupt left America intending to take a trip to Mexico and Nicaragua; that he went to Japan when his money ran low in Mexico; that, while he was issued what he thought was a "passport" by the German Counsul, the paper issued to him stated that he was an American citizen; that, finding employment unsatisfactory in Japan, he signed as a seaman on a German ship and in doing so stated that he was an American citizen; that he later transferred to a ship that went to Germany; that upon arriving there he was treated and listed as an American citizen; that while in Germany he never renounced his citizenship in writing or otherwise; that as a means of getting back home to his parents, and only for that purpose, he entered the school near Berlin; that the contract which he signed in connection with the school was required before he could return to America and that said contract contained no renunciation of his American citizenship; that the work clothes which he wore on his trip to America were not worn in his capacity as a member of the Germany Army but were a necessary requirement for getting back to America; that at no time did he take any oath of

allegiance to Germany or join the German Army or the Nazi Party or renounce in writing or otherwise his American citizenship; that he had at all times intended to return to America; that upon his return to America he returned to his parents' home, applied for a job and registered for the draft; that he never had any intention to commit a crime against the United States and is not guilty of such crime.

Title 8, U. S. Code, Sections 801–2, deals with the subject of expatriation and provides specifically the means by which a person may lose his citizenship. It seems apparent that the petitioner Haupt has not lost his citizenship in any of the ways covered by the statute. He has not remained in any foreign country for the presumptive period of six months. He has not taken an oath of allegiance to a foreign state. He has not served in the armed forces of a foreign state. He has not accepted employment which can be given only to nationals of a foreign state. He has not voted in an election of a foreign state. He has made no formal renunciation of his nationality. He has not deserted the military forces of the United States. Nor has he been convictim of (or even committed) any of the proscribed offenses against the United States.

Under these circumstances he is entitled to the general and well established presumption that a person temporarily residing in a foreign country

is presumed to retain his American citizenship in the absence of clear evidence to the contrary.

(2 Am. Juris. 558.)

If it be suggested that under the German laws Haupt always remained a German citizen because he was born in Germany, the argument manifestly carries too far. For such an argument would mean that no person born in Germany and naturalized in the United States would ever be an American citizen even though he continuously remains in this country.

We respectfully submit that the evidence clearly shows Haupt to be an American citizen.

II

RIGHT OF ENEMY ALIENS TO INSTITUTE THESE ACTIONS

While there has been considerable discussion in the courts and by the text writers as to the right of an enemy alien to institute either actions of a civil nature or actions in connection with the enforcement of criminal remedies against them, the best considered opinions and the more logical texts are to the effect that an enemy alien has the same adjective rights in court as does a United States citizen unless there is a statute or valid Executive Proclamation to the contrary. (As hereinafter pointed out, we contend that the Presdential Proclamation in this case is invalid.)

473001B—42——2

In considering this matter it is important to make certain distinctions. In the first place there are certain English decisions which assume to limit to "subjects" the rights to enter the courts. We do not believe that in America we have the equivalent of "subjects." If it be deemed synonymous with citizens, it is apparent that the English decisions are not applicable here, as there is no doubt about the right of aliens in general to enforce their legal rights in our Courts.

In the second place, decisions under the Trading With the Enemy Act (50 U. S. Code, Appendix) are not in point. This statute expressly applies only to certain personal rights of alien enemies arising out of commercial transactions or the ownership of property. It does not purport in any way to deprive them of their rights to apply for a writ of habeas corpus. This distinction fully explains the ruling of this Court in the recent case of *Ex Parte Colonna,* 86 Law Ed. 357.

The right of enemy aliens to apply for a writ of habeas corpus seems supported by the following authorities:

Ex parte Milligan, 4 Wall. 2, at pp. 115–121.

55 Harvard Law Review (1942), at p. 1058.

In 55 Harvard Law Review (1942), at page 1058, the writer says:

> "In any event, even if the courts are reluctant to encourage resident enemy aliens in commercial transactions, they should at least protect their bodily security until positive executive action to the contrary. In spite of total war the courts of justice will aid little in the efficient prosecution of the war effort by declaring an open season on a not inconsiderable part of our civilian population."

In Opinion of the Attorney General, Vol. 31, p. 361, in discussing the famous case of Ex parte Milligan (hereinafter fully discussed) it is stated:

> Milligan was a citizen of the U. S. *But the provisions of the Constitution upon which the decision was based are not limited to citizens; they apply to citizens and aliens alike.* [Italics supplied.]

In Kaufman v. Eisenberg, 32 N. Y. S. (2nd) 450 at page 454, the Court says:

> "It is my view that until it is manifested by legislative or presidential pronouncement that the right of a resident alien enemy to sue or prosecute in our courts has been withdrawn, the court must recognize and enforce the right, and this, irrespective of any personal views which the judge may entertain that such a right should be denied to all alien enemies."

In *In re Milligan,* 4 Wall. 2, at page 120, the Court says:

> "The Constitution of the United States is a law for rulers and people, *equally in war and peace,* and covers with the shield of its protection, all classes of men, at all times, and under all circumstances." [Italics supplied.]

In Section VIII of this brief we state fully our reasons for considering the Presidential Proclamation of July 2, 1942, unconstitutional and invalid. This is particularly clear as to the part of the Proclamation denying the right to petition for Writ of Habeas Corpus. Not only is there lack of statutory authority for such action on the part of the Executive; but also the Proclamation is in violation of Article I, Section 9, Clause 2 of the Constitution.

It might be suggested that at least statutory authority for the Proclamation is contained in 50 U. S. Code 21, which provides for the internment of alien enemies, but a careful reading of the statute shows that such is not the case. While certain language of this Statute, if read without reference to the entire Statute, might seem to authorize a very broad Presidential Proclamation as to alien enemies, it is apparent that the power conferred upon the President is only in relation

to the internment for which the Statute provides. It cannot possibly authorize a proclamation which would deny an alien enemy of his right to a Writ of Habeas Corpus.

Ex parte Orozco, 201 Fed. Reporter, p. 106.

As a matter of fact, the Court had held that an enemy alien can resort to Habeas Corpus for the purpose of determining the validity of his internment.

Ex parte Risse, 257 F. 102.

In this case the Court held that the petitioner was an enemy alien and, therefore, had to be interned. It is important, however, to note that, upon a finding that the petitioner was an enemy alien, the Court did not dismiss the case for lack of jurisdiction or on the ground that enemy aliens did not have the rights to enter the Courts, but considered the case upon its merits. Such consideration is consistent only with a holding that an enemy alien can file a petition for Habeas Corpus in our Courts.

We find no decision to the contrary and contend that, upon the authorities above cited, as well as upon principles of fairness and justice, the petitioners have a right to raise by Habeas Corpus the question of the validity of their detention.

III.

JURISDICTION OF A MILITARY COMMISSION OVER OFFENSES CHARGED

We will later discuss the manner in which the Order appointing the Military Commission violated express statutory provisions. The petitioners contend that, even if this were not the case, there is nothing in the charges against the petitioners which would justify the President's appointment of a Military Commission. We further contend that there are no facts or conditions which would support any charges that would justify the appointment of such a Commission. These contentions will be discussed in connection with each of the various charges.

A. Spy Charge

U. S. Code 1343 and Article of War 82 are in practically identical language, as follows:

> "ART. 82. *Spies.*—Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

It will be noted that these provisions vest exclusively in a Court-Martial or Military Commission the right to try the charge of spying.

Amendment 5 to the Constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous, crime unless on the presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces,* or in the militia, when in actual service in time of war or public danger." [Italics supplied.] Article 1, Section 8 of the Constitution, provides in Clause 14, that Congress shall have power "to make rules for the government and regulation of the *land and naval forces.*" [Italics supplied.]

U. S. Code 1343 and Articles of War 82 are valid only if they come within the language of the above sections of the Constitution.

It is well settled that under such circumstances the statutes must, if possible, be construed in a manner consistent with the Constitutional provisions. We submit, therefore, that Articles of War 82 (and U. S. Code 1343) necessarily applies only to offenses committed in connection with actual military operations or on or near military fortifications, encampments, or installations. Otherwise the offenses do not arise in the land and naval forces.

This view is fully supported by eminent authorities:

Winthrop on Military Law, 841.
31 Opinion of Attorney General, p. 356.
Willoughby on Constitutional Law, p. 1548, Sec. 1014.
Rules of Land Warfare, par. 7, page 3.

In connection with this feature of the case attention is called to the fact that Article of War 82 requires the offense to be committed "in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, *or elsewhere.*" [Italics supplied.] While the word "elsewhere" has been given conflicting construction, Rules of Land Warfare, issued by the War Department in 1940, contains the following language (Paragraph 204, pages 58 and 59):

> "The Hague definition applies only where the information is obtained or sought 'in the zone of operations,' while the statutory definition is not so limited. The latter, however, includes only persons 'found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere,' and the phrase 'or elsewhere' as here employed, has been held not to justify trial by military tribunals of 'persons charged with acts or offenses committed outside of the field of military operations or territory under martial law or

other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces, such as camp followers.' (Ops. Atty. Gen. U. S., Vol. 31, pp. 356, 361). Persons charged with espionage committed in the United States, outside military jurisdiction, are nevertheless liable to trial and punishment by the civil courts under the espionage laws (United States Code, Title 50, Ch. IV)."

In addition to the requisite that spying under Article 82 must be in or about military installations, there are other requisites of the charge of spying.

Article of War 82 merely uses the words "lurking or acting as a spy" without further definition of spying. The Hague Convention of 1907 provides that "A person can only be considered a spy when acting clandestinely or on false pretenses, *he obtains or endeavors to obtain information in the zone of operations of the belligerent with intention of communicating it to the hostile party.*" [Italics supplied.]

This definition is carried forward in Section 202 of the Rules of Land Warfare and has been approved as a correct definition of spying by established texts:

Wheaton, Int. Law, 6th Ed., Vol. 2, p. 764.

Oppenheim, Int. Law, 1905 Ed., Vol. 2, p. 60.

Furthermore, it is substantially carried forward in Paragraph 142, page 157, Court-Martial Manual (which discusses Article of War 82); and it is there directed that the proof required for spying must include evidence *"that he was obtaining or endeavoring to obtain information* with intent to communicate the same to the enemy." [Italics supplied.]

It is true that Paragraph 209 of Rules of Land Warfare, and Paragraph 142 of the Court-Martial Manual provide that it is not essential to prove that the accused obtained the information sought or that he communicated it. However, this does not purport to dispense with the necessity that there must be either some obtaining of information or some actual endeavor to obtain the same.

It appears, therefore, that the offense of spying is not committed in the absence of any of the following four specific elements, to wit: (1) That the alleged offense was committed in the zone of military operations (as defined above), (2) that the accused at least *endeavored* to obtain information, (3) that the accused intended to obtain such information and communicate it to the enemy, (4) that the information itself must be material information of a military nature. The word "endeavor" connotes a serious attempt and earnest effort to accomplish a designated object, and paragraph 152, at page 190, Manual for Courts-

Martial, lays down the rule that "mere *preparation* to do a criminal act" [italics supplied] does not constitute an *attempt* to commit a crime. The mere proof that persons in uniform landed on the American coast from a submarine, or otherwise, does not supply any of these elements.

The specification under the charge of spying (Charge III in Exhibit E) entirely fails to allege any endeavor to obtain military information; and it is our contention that, therefore, no offense of spying is charged and that for this reason (as well as others) a military commission cannot be validly appointed to try this charge and cannot try the same. We further contend that there are no *facts* to show any endeavor to obtain military information or any intent to obtain it or communicate it to the enemy.

On account of the provisions relating to secrecy of the trial before the alleged Commission, counsel for the petitioners do not refer in this brief to the testimony on the charge of spying but ask permission to furnish to this Court at the hearing a summary of the evidence on "spying" as disclosed in the certified record before the alleged Commission.

Attention, however, is here called to the fact that none of the petitioners committed any acts on, near, or in connection with any fortifications, posts, quarters, or encampments of the Army, or on, near, or in connection with any other military installations, or at any location within the zone

of operations. This feature of the matter is further and more fully discussed under Section IV of this brief.

It seems apparent that with a correct construction of Article of War 82, that is, a construction consistent with the Constitution of the United States, the defendants have not been guilty of the charge of spying.

The André case has at times been cited as authority against the position here urged by the petitioners. However, the consensus of opinion is that this case was improperly decided and was the result of intense feeling arising out of the prominence and publicity of the Benedict Arnold episode.

Wheaton, International Law, 6th Ed., Vol. 2, page 766,

Oppenheim, International Law, 1905 Ed., Vol. 2, page 161,

Halleck, International Law, 3d Ed., page 573.

The question may be raised that this Court cannot pass upon the sufficiency or insufficiency of evidence to prove the commission of an offense. However, we think that the authority of a Military Commission to act under Article of War 82 is dependent upon an offense of spying being committed, and is certainly dependent upon some act being committed within the zone of military operations as defined by Article 82. In the absence of evidence to show any acts within

this zone, there is no authority for a Military Commission under Article of War 82.

B. Alleged Violation of Article of War 81

Article of War 81 reads as follows:

> "Art. 81. RELIEVING, CORRESPONDING WITH, OR AIDING THE ENEMY.—Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct."

As in the case of Article of War 82, it is expressly provided that trial may be by a Military Commission. The fact that the acts alleged to have been committed by the petitioners were not in the zone of military operations would also preclude the jurisdiction of a Military Commission to try this offense.

In fact, just as in the case of spying, the situation under Article of War 81 is more favorable to the petitioners because the offense sought to be described therein is also in violation of specific criminal statutes of the United States, to wit: 18 U. S. Code, Section 1, 50 U. S. Code, Section 31–42, 50 U. S. Code, Section 101–106. This differentiates the case from the charge of spying in the zone of military operations.

(It may be appropriate at this point to call attention to the difference between spying as used in the Article of War 82 and espionage, as defined in our statutes. The latter offense is the giving of information to the enemy where such crime is committed outside of the zone of operations. Rules of Land Warfare, Sec. 204, p. 58. Compare Wheaton, International Law, 6th Ed. Vol. 2, page 764.)

In the instant case the petitioners were arrested by the civil authorities, waived arraignment before a civil court and also waived removal to another Federal judicial district (Exhibits G and H attached to petition). The civil courts thereby acquired jurisdiction; and there was no authority for the military authorities to oust these courts of this jurisdiction.

C. Violation of the Law of War

The first charge against the petitioners is violation of the Law of War. We have been unable to find in the published Rules of Land Warfare any such offense as is described in the specifications of the first Charge. These Rules of Land Warfare were prepared in 1940 under the direction of the Judge Advocate General and purport to include all offenses against the Law of War.

Furthermore, the alleged Law of War which is asserted by the prosecution is a species of international law analogous to common law. No principle is better settled than the principle that there

is no common law crime against the United States Government. Each crime must be covered by a specific criminal statute. 11 Am. Juris. p. 158.

If there were such a crime as a violation of the Law of War and if the same was correctly charged against the petitioners, it is apparent that the first charge does no more than to include offenses of sabotage and espionage which are specifically covered by 50 U. S. Code, Section 31–42, and Section 101–106 which is triable by the civil courts. There also arises here again the objection that the petitioners committed no acts in the zone of active military operations.

D. Conspiracy

Of course, the charge of conspiracy cannot stand if the other charges fall. We further call attention to the fact that there is an express statute, 18 U. S. Code 88, dealing with the criminal offense of conspiracy. We submit that this charge is not triable by a military commission.

E. Conclusion

In connection with all the charges we find that the conduct of the petitioners as shown by the evidence is nothing more than preparation to commit the crime of sabotage. (Even the charges themselves so indicate by use of the word "preparing".) There was no overt act. In fact, the objects of sabotage had never been specifically selected and the plan of the parties did not

contemplate any act of sabotage within a period of three months. These facts are not even sufficient to constitute an attempt to commit sabotage.

Furthermore, as pointed out above, none of the alleged criminal acts of the petitioners were committed in the zone of military operations. The civil courts are functioning both in the localities in which the offenses were charged to have been committed and in the District of Columbia where the alleged offenses are being tried. In these localities there is no martial law and no other facts which would justify action by a military tribunal.

It might be suggested that the Supreme Court cannot go into questions of fact even where such questions determine the jurisdiction of the Military Commission, and that the Military Commission must itself determine these facts subject to the right of review. The first answer to this is that where, as in this case, it clearly appears that the jurisdictional facts do not exist, the Supreme Court can consider this matter in determining the question of jurisdiction. There is a further answer in this case, because there is here no real right of review and, therefore, the only way in which the petitioners as a practical matter can raise this jurisdictional question is by Writ of Habeas Corpus.

We contend that, for the reasons above stated, a Military Commission cannot properly be ap-

pointed or act to try the charges and specifications filed against these petitioners.

IV

JURISDICTION OF MILITARY COMMISSION OVER PERSONS OF PETITIONERS

Article of War 2 defines the persons who are subject to military law and includes therein members of the armed forces and other designated persons. These cannot conceivably include the petitioners herein. Military courts-martial and other military tribunals have no jurisdiction to try any other person for offenses in violation of the Articles of War except in the cases of Articles 81 and 82. It is possible that other classes of persons may be triable by military tribunals for violations of the Laws of War, not included in the Articles of War.

As set out under Section III of this brief, the only Constitutional construction of Articles 81 and 82 is that military tribunals can have no jurisdiction over any other classes of persons (except those specified in Article of War 2), unless they are committing prohibited acts in some zone of active military operations. The same is necessarily true of any alleged violations of the Laws of War.

Ex Parte Milligan, 4 Wall. 2.

31, Opinions of the Attorney General, 356.

473901B—42——3

In the above cited opinion of the Attorney General, at page 361, it is stated:

> "However, if there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, cannot constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and all the above-cited provisions of the Constitution would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during war times."

Civil persons who commit acts in other localities than the zone of active military operations are triable only in the civil courts and under the criminal statutes of the United States. These statutes have been previously cited.

In the instant case, the petitioners landed from a submarine in Florida or on Long Island. At the point where they landed, no military engagement or combat of any kind was in progress. While it is true that the territory along the coast was patrolled by the Coast Guard, the patrol was unarmed. It would be a strained use of language to say that this patrol made the beach a military line or part of the zone of active operations.

Nor is the situation changed by the fact that on the Long Island Beach some distance away was located a Signal Corps platoon engaged in operating a radio locator station. The evidence shows that this platoon did not patrol the beach and was not engaged in any military offensive or defensive operation at the time the petitioners landed.

The prosecution may contend that the petitioners were in the zone of military operations because the location was within the Eastern Defense Command. However, it appears that the whole United States is divided into defense areas or sectors and that the orders therefor are substantially similar to those providing for the southern and eastern defense sectors. If the prosecution were correct

in its contention that the issuance of orders for these sectors creates a zone of active military operations, then the entire United States is a zone of active military operations and persons located therein are subject to the jurisdiction of military tribunals. Such cannot be the case.

The stipulation between the parties sets out the full data relative to the character of the territory where the alleged offenses were committed.

We call particular attention to the fact that prior to March 18, 1942, the Eastern Seaboard was designated as the "Eastern Theatre of Operations," and that on said date it was changed from "Eastern Theatre of Operations" to "Eastern Defense Command." It appears from the evidence that the reason for this change was the character of the area with reference to military supply functions which was such that it could not properly be considered as a "Theatre of Operations" as defined in Paragraph 4, FM 100–5 (1941). This change is still in effect. Here is a clear declaration by military authorities that the Florida and Long Island seacoasts were not and are not in any true sense zones of active military operations, but are instead parts of the Zone of the Interior as defined in paragraph 5 of the above-mentioned Field Service Regulations.

We note a possible contention of the prosecution that a special rule applies to the petitioners because they were caught "in fresh pursuit." If this were indeed a fact, we do not believe it could

possibly confer upon a Military Commission jurisdiction it could not otherwise exercise. Nor would the facts themselves seem to show that the petitioners were apprehended "in fresh pursuit." The apprehension took place several days after their landing and in territory widely separated from the point of landing. The circumstances of apprehension are fully disclosed in the record.

Nor can the Commission be justified on the ground of Martial Law. Martial Law is a matter of fact and not a matter of Proclamation; and a Proclamation assuming to declare martial law is invalid unless the facts themselves support it. This has been expressly held in the case of State Governors; and we know of nothing to indicate that the same rule does not apply to the President of the United States.

See *Sterling* v. *Constantine*, 287 U. S. 378.

In the instant case it cannot well be contended that the effect of the President's Order and Proclamation is to create martial law in the entire eastern part of the United States. Neither the order nor the proclamation so indicate. In view of the facts, there would seem to be no adequate reason either of military necessity or otherwise for depriving any persons in the territory involved in the instant case of the benefit of constitutional provisions guaranteeing an ordinary and proper trial before a civil court, including not only the provisions of the fifth

amendment but also the provisions of article III, sec. 2, clause 3, of the Constitution and the provisions of the sixth amendment. 12 Cal. L. Rev. (1924), 75, 178. Nor do the facts themselves in the instant case justify martial law in the territory in question. Attention is called to the fact that trial by a military commission in Indiana was found to be unlawful in the case of *Ex Parte Milligan,* 4 Wall. 2, even though Indiana had been actually invaded at the time.

There would then seem to be no reason for depriving any persons in the territory involved the benefit of the Constitutional provisions guaranteeing an ordinary and proper trial before a civil court. Such Constitutional provisions include not only the provisions of the Fifth Amendment but also the provisions of article III, sec. 2, subsection 3, and the provisions of the Sixth Amendment.

V

INVALIDITY OF PROCLAMATION

On July 2, the same day of the Presidential Order, the President issued a Proclamation (Exhibit B), the effect of which is to deny the right to enter civil courts to "citizens or residents of any nation at war with the United States or persons who give obedience to or act under direction of any such nation and who during time of war enter or attempt to enter the United States through coastal or boundary defenses and are

charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war." The Proclamation declares that such persons are subject to the jurisdiction of military tribunals.

The prosecution contends that this Proclamation applies to the petitioners; and the petitioners can not deny that the language has a startling similarity to the charges and specifications made against the petitioners and served upon them on the following day. Nor can the petitioners deny that this Proclamation was issued at the same time as was the Order appointing the Military Commission.

This Proclamation, if valid, affects the right to maintain this action, and also to some extent may affect the validity of the Military Commission.

We contend that the President had no authority to issue such Proclamation in the absence of a statute giving him this authority. We know of no inherent or Constitutional right of the President to issue Proclamations in matters affecting such substantial rights as this Proclamation purports to affect. We call attention to the fact that in England the practice has been for Parliament to authorize action similar to that embodied in the President's Proclamation.

4 and 5 George V, c. 29,
5 and 6 George V, c. 8,
10 and 11 George V, c. 55,
2 and 3 George VI, (1939) c. 62.

We have already pointed out the Constitutional difficulties of this Proclamation so far as it affects the creation of a Military Commission and have cited *Ex Parte Milligan* in connection therewith. We have also discussed the Proclamation so far as it affects the Writ of Habeas Corpus. We call further attention to the fact that the Constitutional right to suspend the Writ of Habeas Corpus is included in the Article and Section of the Constitution dealing with the powers of Congress. It is well settled that only Congress can suspend the Writ and then only in cases of rebellion or invasion.

Constitution, Art. 1, Sec. 9, Cl. 2,
Ex Parte Merryman, 17 Fed. Cas. 114 (Opinion by Justice Taney),
Ex Parte Bollman, 4 Cranch 101,
McCall v. *McDowell,* Fed. Cas. No. 8673,
Ex Parte Benedict, 3 Fed. Cas. No. 1292,
Willoughby, Constitutional Law, Sec. 1057.

Furthermore, as to these petitioners, the Proclamation was issued after the commission of the acts which are charged as crimes against them; and the Proclamation is, therefore, ex post facto as to them. The Proclamation would affect the petitioners in a serious and substantial manner. Without the Proclamation and under the applicable criminal statutes, the maximum penalty for sabotage in time of war could not exceed 30 years, and in case of espionage the death penalty

is not mandatory. On the other hand, for the alleged military offenses, upon which the Commission is seeking to try the petitioners, the maximum penalties sought by the prosecution are death in each case with a mandatory death sentence in the case of spying.

Attention is here called to the fact that the Congressional statutes for sabotage and espionage make a definite distinction in penalties depending upon whether the crime is committed in time of war or in time of peace. This indicates clearly that Congress was specifically legislating for acts committed under the condition in which the Nation finds itself today and did not contemplate trial thereof by a Military Commission.

We do not believe that Congress itself on July 2 (after the alleged commission of crime) could have passed valid legislation containing the provisions of the Proclamation and increasing the penalty for acts already committed.

> Constitution, Art. 1, Sec. 9, Cl. 3, *Thompson* v. *Utah,* 170 U. S. 343; *Burgess* v. *Salmon,* 97 U. S. 384.

Nor could Congress at that time have authorized such Proclamation by the President. *A fortiori* the President had no right to issue the Proclamation without statutory authority.

Another unusual feature of the Proclamation is that exception could be made thereto only under regulations of the Attorney General approved by

the Secretary of War. The President's Order of July 2 appointed the Attorney General to join with the Judge Advocate General in the prosecution of these petitioners; and the Order appointing the Military Commission was contemporaneous with the action of the Secretary of War in taking these petitioners from civil custody and ordering their delivery for trial before a Military Commission.

For all the above reasons, we submit that the President's Proclamation of July 2 is totally invalid and unconstitutional. We submit that it is in express violation of the Fifth and Sixth Amendments to the Constitution, of Article III, Section 2, Clause 3 of the Constitution and of Article I, Section 9, Clause 2 of the Constitution.

VI

PROVISIONS OF PRESIDENTIAL ORDER IN CONFLICT WITH EXPRESS STATUTES

If we could assume that a Military Commission had jurisdiction over the person of the petitioners and had jurisdiction to try the charges and specifications against the petitioners, the Order of the President would, in our opinion, still be invalid because it violates in certain specific particulars express acts of Congress as embodied in the Articles of War.

Article of War 38 expressly provides in part as follows:

> "The President may, by regulations, which he may modify from time to time, pre-

scribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, *military commissions*, and other military tribunals, which regulations *shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed.*" (Italics supplied.)

It will be noted that the President is given authority by regulation to modify from time to time procedure and modes of proof before military commissions but that this authority is circumscribed in two ways:

(1) The regulations shall, so far as he shall deem practicable, apply the rules of evidence of United States District Courts.

(2) The regulations shall prescribe nothing contrary to or inconsistent with the Articles of War.

The President's order in providing for admission of such evidence "as would, in the opinion of the President of the Commission, have probative value to a reasonable man" radically departs from the rules of evidence of the United States district courts and assumes to leave the admission of testimony to the unlimited discretion of the President of the Commission, irrespective of the opinions of the other members of the commission.

The order does not recite or indicate any reason of practicability requiring this radical departure. We believe that this provision in the Presidential order is a violation of both the letter and spirit of Article of War 38 and that, since it goes to the very heart of the case, it renders the entire order invalid. This is especially true in view of the practical application which has been given to the mode of proof indicated in the President's order. This feature of the matter is later called to the attention of the court in more detail.

However, it is not necessary even to resort to construction to show that the order expressly violates the other provision of Article of War 38 to the effect that no regulations shall be inconsistent with the Articles of War.

In the first place, Article of War 43 contains the following express provision:

> "ART. 43, DEATH SENTENCE—WHEN LAWFUL.—No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths

of all of the members present at the time the vote is taken."

Article 82 provides a mandatory death penalty; and for a violation of Article 81 a death sentence or an unlimited period of imprisonment can be imposed. The prosecution is contending that the death penalty also applies to the charge for violation of the Law of War and for the conspiracy charge; and, if there are any such offenses, the penalty is certainly in excess of ten years.

Notwithstanding this fact, the Presidential Order expressly provides that the concurrence of only two-thirds of the members of the Commission shall be necessary for a conviction or sentence. This is a very material variation from the express provisions of Article 43, which requires a unanimous vote for the death penalty.

If it be urged that the Commission has not yet acted and that their decision might possibly be unanimous or by a three-fourths vote, the answer is that this would not cure the defect in the Order or the denial of rights of the petitioners incident thereto. For it would be impossible to determine how much the decision was affected as a practical matter by the knowledge on the part of the Commission that only a two-thirds vote was actually necessary for conviction.

Another serious practical difficulty is presented in this connection. The Commission has ruled

that no announcement will be made in Court and no information given to the petitioners or their counsel as to the findings or sentence or any other action of the Commission. The Commission has stated that its findings and sentence will be transmitted directly and secretly to the President for final action. There is no requirement that the President either delay action or delay the imposition or execution of any sentence against these petitioners or give prior notice thereof to these petitioners.

This fact would make it impossible for the petitioners to determine either what the vote of the Commission was on any charge or specification against any petitioner or to take any timely action based upon a vote contrary to the provisions of Article of War 43. Hence petitioners' rights in this respect must be protected now, if at all.

Article of War 70 provides in part as follows:

> "No charge will be referred for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf,

either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

"Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff Judge Advocate for consideration and advice."

The full meaning of this provision is discussed in paragraphs 30 and 35 of the Court Martial Manual; but even without the aid of this manual the meaning of Article 70 is entirely clear. The procedure of investigation provided therefor is analogous to consideration by a grand jury or committing officer in connection with charges in a district court. In fact, the defendant is given, by Article 70, a right of cross-examination which would not exist in the case of an indictment in the civil courts.

The President's order expressly dispenses with this right of an accused, by summarily ordering the petitioners to trial before a military commission. As shown by stipulation in the record, there has, in fact, been no such investigation as is prescribed by Article 70.

This is a substantial deprivation of rights afforded the accused under the Articles of War. A trial without such investigation is just as invalid as would be a trial in the district court

without either commitment, presentment, or indictment. Such a trial, of course, would be absolutely void.

Article of War 46 is as follows:

> "ART. 46. ACTION BY CONVENING AUTHORITY.—Under such regulations as may be prescribed by the President every record of trial by general court martial or military commission received by a reviewing or confirming authority shall be referred by him before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being."

Article of War 50½ provides in part as follows:

> "ART. 50½. REVIEW: REHEARING.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.
>
> "Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of Article 46, Article 48, or Article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion in writing to the Judge Advocate General who shall, except as

herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

"Except as herein provided, no authority shall order the execution of any other sentence of a general court martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence."

Article of War 50½ contains other detailed provisions as to review of findings and sentences.

Articles 46 and 50½ must be read together. In fact, Article 50½ expressly refers to Article 46. When so read together a complete system of review is provided for the action of the military court. Article 46 is made expressly applicable to a Military Commission, and, by reference to Article 46, Article 50½ is made applicable to a Military Commission.

The method of review so provided requires among other things a Board of Review, constituted by the Judge Advocate General in his office, and requires that such board shall submit its opinion to the Judge Advocate General who shall transmit the same to the President with the recommendations of the Judge Advocate General.

473901B—42——4

Article 50½ further provides that neither a death sentence nor a sentence of confinement in a penitentiary shall become effective until the Board of Review, with the approval of the Judge Advocate General, has held that the record of trial is legally sufficient to support the sentence.

In contrast with these statutory provisions the President's order provides that "the record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon." This is an express violation of the statutory provisions of Articles of War 46 and 50½.

It may be contended that the President is not prevented by his Order from following the method of review prescribed by Articles 46 and 50½ if he so elects. However, at most the Presidential order would leave some method of review to the discretion of the President, when under the provisions of Articles 46 and 50½ the petitioners are entitled to a specific method of review as a matter of right and not as a matter of discretion. An even more complete answer is that Article of War 50½ requires the action by the Board of Review and the recommendation of the Judge Advocate General before the case is ever submitted to the President, while the Order provides for the Commission to transmit the record of the trial, including any judgment or sentence, *directly* to the President for his action thereon.

(We again call attention to the fact that the petitioners are not to be advised of the result of any of the proceedings as to conviction or sentence until the final action of the President.)

Furthermore, the President's Order has made it impossible to comply with these statutory provisions by directing the Judge Advocate General (and the Attorney General) to conduct the prosecution, thereby disqualifying the Judge Advocate General and his subordinates from acting as a reviewing authority. The proceedings disclose that the Judge Advocate General has in fact assisted in the conduct of the prosecution.

It can hardly be contended that this is not a material violation of the statutory rights afforded accused persons by the Articles of War. The provisions of Article 46 and 50½ are the methods of appeal of a person tried before a Military Commission. The President's Order deprives them of this method of appeal.

In discussions before the alleged Military Commission the prosecution suggested that in Article 38 the proviso that the rules should prescribe "nothing contrary to or inconsistent with these Articles" did not mean to refer to Articles of War prescribing the procedure for Courts-Martial. This interpretation would not only be directly contrary to the language of Article 38, but would

also leave the proviso meaningless so far as Military Commissions are concerned—and this in spite of the fact that Military Commissions are expressly mentioned in the same sentence in which the proviso occurs.

Of course, Article 46 and Article 50½ (the latter of which Articles refers to the former) specifically provide a procedure for Military Commissions; and the argument suggested above would not be applicable to the requirements of review prescribed in said Articles 46 and 50½. The direct violation of the provisions of these Articles has already been called to the Court's attention.

It will be noted that Articles 46 and 50½ do not require the aid of Article 38 for their interpretation. It will also be noted that every other provision of the Articles of War relating to procedure refers to the procedure of Courts Martial. Therefore, unless the proviso of Article 38 is intended to refer to the Articles prescribing procedure for Courts Martial, the proviso would have no meaning and application at all.

There is no reason for a construction which produces such an absurd result and which makes the language of the proviso meaningless. This is particularly true where the language of the Proviso and Article 38 in its entirety is perfectly clear. The applicability of Article 38 was recognized in the Presidential Order which referred to rules "consistent with the powers of Military Commissions under the Articles of War." *In fact, the*

President bases his alleged authority on the Constitution and Statutes "and more particularly the Thirty-Eighth Article of War." [Italics supplied.] Apparently the prosecution also thought Article 38 applicable by suggesting that the Attorney General be considered as a trial Judge Advocate.

But in any event it is entirely clear that a cardinal purpose of Article 38 was to provide a procedure for Military Commissions, and that a part of that procedure is the proviso that nothing in the procedure shall be "contrary to or inconsistent with these Articles" (meaning the Articles of War).

We have pointed out the sharp inconsistency between the President's Order and the procedure prescribed in the Articles of War. We submit that these direct conflicts with express Congressional statutes render the President's Order illegal and invalid.

VII

DELEGATION OF RULE-MAKING POWER TO COMMISSION

As stated above, Article 38 provides that the President may by regulation prescribe the procedure for Military Commissions (subject to the limitations which we have previously mentioned). There is no provision that he can delegate to anyone else the right to prescribe such rules.

Notwithstanding this fact, the President in his Order provides: "The Commission shall have power and shall, if the occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."

In other words, the President, instead of prescribing the procedure for the Military Commission, has, in this case, purported to delegate to the Commission itself the right to prescribe such procedure. The situation is not altered by the provision in the Order that the procedure shall be "consistent with the power of Military Commissions under the Articles of War." For the President's own right to prescribe procedure would be subject to the same limitation. The Order still delegates powers which the Statute vests in the President; and as hereinafter set forth, the Commission has acted under this delegation of powers.

The President's Order does not even require the rules to be prescribed before the hearing begins, but apparently authorizes rules to be made from time to time "as occasion requires." The Commission has in fact made most of its rules as the case progressed. It is difficult to distinguish between rules made in this manner and no rules at all.

It seems manifest to us that this broad delegation of power sought to be given in violation of well

established legal principles, makes the Order invalid and renders void all procedures before the Commission.

VIII

RULES MADE BY THE COMMISSION

Articles of War 18 provides in part: "Each side shall be entitled to one peremptory challenge." At the beginning of the hearing before the Commission, the petitioners sought to exercise this right to peremptory challenge and to challenge one member of the Commission.

The Commission, assuming to act in accordance with the President's Order of July 2, denied this right of challenge. This is in express violation of the statutory enactment of Article of War 38, because the Commission prescribed a procedure "contrary to" and "inconsistent with" Article 18.

Furthermore, assuming to apply the standard of "probative value to a reasonable man," sought to be delegated to the President of the Commission by the Order of July 2, 1942, the Commission admitted as against other defendants, the confessions of each defendant, although each such confession was made after the apprehension of the person confessing and after his alleged participation in the conspiracy had ended and after his action in furtherance thereof had ceased. None of these confessions were made in the presence of the other defendants.

Not only were these confessions admitted on the charge of conspiracy, but they were also admitted on the other charges and specifications. These confessions were used to prove material facts in making out a case against the petitioners.

We believe that these rules on procedure are invalid and that the first of them is in express violation of Articles of War 18 and 38.

If it be suggested that these are matters which do not affect the jurisdiction of the Commission or the validity of the proceedings, but are merely questions which may be raised on appeal or review, the answer is that the President's Order has deprived the petitioners of such appeal or review, as previously pointed out to the Court.

(On this entire question of rules of procedure it is interesting to note from 55 Harvard Law Review, p. 1295–6, that apparently the rules used by the Military Commission here were a much greater departure from the ordinary procedure of Courts-Martial than were the rules of the Military Commission in Hawaii immediately following Pearl Harbor, when there was a critical emergency and a specific declaration of martial law.)

These rules of procedure in the instant case, adopted in reliance on the President's Order, again show the invalidity of this Order because of its violation of express statutory provisions.

IX

EX PARTE MILLIGAN AND OTHER CASES

The leading decision on the matters in controversy in this procedure is the case of Ex Parte Milligan, 4 Wallace 2. The case was decided in 1866, and it has been cited on numerous occasions and discussed by text writters and in law review articles for many years. It has never been overruled.

55 Harvard Law Review (1942) 1295.

In that case Milligan was charged during the Civil War with giving aid and comfort to the enemy, communicating with the enemy, engaging in other similar practices and violating the Laws of War. He was arrested, tried and sentenced by a Military Commission. The President had issued a Proclamation suspending the writ of habeas corpus; and the Military Court was appointed by the General commanding the District pursuant to authority given him by the President. Milligan filed a petition for a writ of habeas corpus for his release. There was a unanimous decision in favor of his release but there was a divergence in views among the members of the Court. Five members joined in the majority opinion and four in a separate concurring opinion. The majority

opinion held not only that the President did not have authority to issue his Proclamation or to provide for a trial by a Military Commission, but also that even Congress did not have such authority. The minority opinion conceded the authority of Congress, but held that Congress had not exercised its authority in this case and that the President was not authorized in acting without the authority of Congress.

However, the nine Judges agreed on certain principles which, it seems to us, are determinative of the present case. In particular they held that a Military Commission is without jurisdiction to try a person not a member of our armed forces under the Laws of War in a military district in which the civil courts were functioning and in which there is no insurrection or rebellion, unless (as the minority held) Congress has enacted legislation conferring such jurisdictional power.

They further held that the power to declare martial law and supersede the judicial process can be authorized only by Congress and then only in times of actual and existing insurrection or invasion within districts or localities where ordinary law no longer protects public safety and private rights. They further held that the President of the United States did not possess any power to prescribe a trial by a Military Commission in districts or localities where the civil courts were adequately functioning.

The pertinent language of the majority opinion includes the following:

At page 121:

> "Every trial involves the exercise of judicial power; and from what source did the military commission that tried him derive their authority? Certainly no part of the judicial power of this country was conferred on them; because the Constitution expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. *They can not justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."* [Italics supplied.]

And at page 127:

> * * * Martial Law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. * * * [Italics supplied.]

And again at page 127:

> "It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are ac-

tually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

Pertinent parts of the minority opinion contain in part the following language:

At page 141:

"* * * What we have already said sufficiently indicates or opinion that there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our army or navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be

exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times or insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, in such times and in such localities, to authorize trials for crimes against the security and safety of the national forces, may be de-

rived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

The minority seems to have stated its extreme position on pages 136 and 140, as follows:

"We agree in the proposition that no department of the government of the United States—neither President, nor Congress, nor the Courts—possesses any power not given by the Constitution.

We assent, fully, to all that is said, in the opinion, of the inestimable value of the trial by jury, and of the other constitutional safeguards of civil liberty. And we concur, also, in what is said of the writ of habeas corpus, and of its suspension, with two reservations: (1) That, in our judgment, when the writ is suspended, the Executive is authorized to arrest as well as to detain; and (2) that there are cases in which, the privilege of the writ being suspended, trial and punishment by military commission, in states where civil courts are open, may be authorized by Congress, as well as arrest and detention.

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana. * * *

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.

Where peace exists the laws of peace must prevail. What we do maintain is, that when

> the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety."

It appears, therefore, that the entire Court in *Ex Parte Milligan* enunciated principles which fully support the position which the petitioners are taking in this case.

In spite of the criticism of some features of the decision in *Ex Parte Milligan* the great weight of judicial and professional opinion supports the case, at least as far as the minority opinion goes, which is sufficient for our purposes in this proceeding. Attorney General Gregory in 31 Opinions of Attorney General, at page 361, says:

> The Milligan decision has been the subject of extensive discussion and attack, and the contention has been made that the discussion of the constitutional questions was not essential to the decision and therefore merely dicta. However, if there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts martial or military commis-

sions, can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside of the field of military operations, or territory under martial law or other peculiarly military authority except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and all the above-cited provisions of the Constitution would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during wartimes.

Other decisions following or citing with approval the *Milligan* case, are—

Sterling v. *Constantin,* 287 U. S. 378.
Caldwell v. *Parker,* 252 U. S. 376.
Kahn v. *Anderson,* 255 U. S. 1.
Home Building & Loan Assn. v. *Blaisdell,* 290 U. S. 398.
Carter v. *Carter Coal Co.,* 298 U. S. 330.

It is our view that the majority opinion in the *Milligan* case is still the law and the Constitu-

tional protections provided therein still govern the trial of persons in this country. We contend that even Congress could not authorize a Military Commission in the instant case. However, it would not seem necessary for the Court to decide this question; for Congress has not in fact acted.

It seems to us clear that the President had no right to create this Commission without Congressional authority and, of course, had no right to give a Commission powers which are in express violation of Congressional enactment.

If there is a feeling that the penalties for wartime sabotage and espionage are not severe enough, Congress can, of course, promptly remedy this situation as to future cases. Therefore, a decision in favor of the petitioners here could leave no inference with our enemies or others that persons guilty of sabotage or espionage would in the future incur less than the most severe penalty.

X

CONCLUSION

May we respectfully suggest that the instant case presents a real test of our Democratic form of Government and its judicial system. It is trite but still true to say that the soundness of any system of government proves itself in the hard cases where there is an element of public clamor. Such circumstances test the real ability of a gov-

ernment and its judicial system to protect the rights of an unpopular minority.

Respectfully submitted.

CASSIUS M. DOWELL,
Colonel, United States Army,
KENNETH C. ROYALL,
Colonel, Army of the United States,
Attorneys for Petitioners.

APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION

Article 1, Section 8.

> The Congress shall have Power * * *
> To make Rules for the Government, and Regulation of the land and naval Forces * * *

Article III, Section 2, Clause 3:

> The trial of all crimes, except cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such Place or Places as the Congress may by law have directed.

Article I, Section 8, Clause 14:

> To make Rules for the Government of the land and naval Forces.

Amendment 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

STATUTES

THE ARTICLES OF WAR

(Title 10 U. S. C. § 1471–1593a)

Articles of War 2:

ART. 2. Persons subject to Military Law—The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these Articles: *Provided,* That nothing contained in this act, except as specifically provided in article 2, subparagraph (c), shall be construed to apply to any person under the United States naval jurisdiction unless otherwise specifically provided by law.

(a) All officers, members of the Army Nurse Corps, warrant officers, Army field clerks, field clerks Quartermaster Corps, and soldiers belonging to the Regular Army of the United States; all volunteers, from the dates of their muster or acceptance into the military service of the United States; and all other persons lawfully called, drafted, or ordered into, or to duty or for training in, the said service, from the dates they are required by the terms of the call, draft, or order to obey the same;

(b) Cadets;

(c) Officers and soldiers of the Marine Corps when detached for service with the armies of the United States by order of the President: Provided, That an officer or soldier of the Marine Corps when so detached may be tried by military court martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles he may be tried by a naval court martial after such detachment ceases;

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;

(e) All persons under sentence adjudged by courts martial;

(f) All persons admitted into the Regular Army Soldiers' Home at Washington, District of Columbia.

Article 18 (§ 1489):

Members of a general or special court martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 790.)

Article 38 (§ 1509):

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules made in pursuance of this article shall be laid before the Congress annually. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 794.)

Article 43 (§ 1514):

No person shall, by general court martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said

court martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be determined by a majority vote. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 795.)

Article 46 (§ 1517):

Under such regulations as may be prescribed by the President every record of trial by general court martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being. (June 4, 1920, ch. 227, subch. II, § I, 41 Stat. 796.)

Article 50½ (§ 1522): Article 50½ is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1522.

Article 70 (§ 1542): Article 70 is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1542.

Article 81 (§ 1553):

Whosoever relieves or attempts to relieve the enemy with arms, ammunition,

supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 804.)

Article 82 (§ 1554):

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall on conviction thereof, suffer death. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 804.)

(Title 8, U. S. C., sec. 801)

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * *

* * * * *

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an elec-

tion or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunication of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. (Oct. 14, 1940, c. 876, title I, Subch. IV, sec. 401, 54 Stat. 1168.)

18 U. S. Code, Sec. 1:

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

18 U. S. Code, Sec. 88:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000 or imprisoned not more than two years, or both.

50 U. S. Code, Ch. IV:

These statutes are too lengthy to print in this appendix. Reference is therefore made to the U. S. Code for its provisions.

50 U. S. C. § 21:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

U. S. GOVERNMENT PRINTING OFFICE: 1942

BLANK PAGE

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 29 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

SPECIAL JULY TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

UNITED STATES EX REL. ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

RESPONDENT'S ANSWER TO PETITIONS

JULY 29, 1942.

BLANK PAGE

In the Supreme Court of the United States

SPECIAL JULY TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

UNITED STATES EX REL. ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

RESPONDENT'S ANSWER TO PETITIONS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Albert L. Cox, Brigadier General, United States Army, Provost Marshal of the Military District of Washington, as respondent herein, for answer to the petitions of Ernest Peter Burger, Herbert Hans Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Otto Neubauer, Richard Quirin, and Werner Thiel, for writs of habeas corpus directed to this respondent to produce before said court the bodies of said petitioners and to do and perform whatsoever the court may re-

quire to be done in the premises, respectfully represents unto this honorable court:

1. The petitioners are seven of the eight persons who are now on trial before a Military Commission appointed by the President of the United States on July 2, 1942. The other person on trial, not a petitioner, is one George John Dasch. All eight of these men were trained at a sabotage school operated at a place near Berlin, Germany, receiving instruction in the use of explosives and brief instructions in methods of secret writing. On or about May 22, 1942, these eight men were sent from Germany to a seaport in Occupied France. At this seaport, four of them, namely, Burger, Dasch, Heinck, and Quirin boarded a German submarine which proceeded across the Atlantic Ocean to Amagansett Beach, Long Island, in the State of New York. These four men were landed from the submarine in the hours of darkness on or about June 13, 1942, carrying with them a supply of explosives, incendiaries, fuses, and timing devices. While landing they wore the uniforms, or parts of the uniforms, of the German Marine Infantry. They buried these uniforms and their supplies of explosives in the sand at Amagansett Beach, and proceeded in civilian dress to New York City.

2. The other four men, namely, Kerling, Haupt, Neubauer and Thiel, boarded another German submarine at the above-mentioned seaport in occu-

pied France and proceeded thence across the Atlantic Ocean to Ponte Vedra Beach on the coast of Florida. These four men, carrying with them a supply of explosives, incendiaries, fuses, and timing devices, landed on Ponte Vedra Beach during the hours of darkness on or about June 17, 1942. While landing, they wore the uniform caps of the German Marine Infantry. They buried their caps and their supplies of explosives in the sands of Ponte Vedra Beach and proceeded in civilian dress to Jacksonville, Florida. From Jacksonville they went to various points in the United States.

3. All eight of these men were taken into custody by agents of the Federal Bureau of Investigation at various dates between June 19, 1942 and June 27, 1942. Petitioners Haupt and Neubauer were apprehended in Chicago, Illinois, and the other petitioners in New York, N. Y. They all admitted the facts stated in the preceding paragraphs of this answer, and admitted that they had received instructions from Lieutenant Walter Kappe of the German High Command to sabotage and destroy war industries and war facilities in the United States, for which activities they or their relatives in Germany were to receive salary payments from the German Government. They further admitted that they had been paid by the German Government during their course of training at the sabotage school, and they had received substantial sums in American currency from the

German Government before boarding the submarines on which they crossed the ocean. This currency was in their possession when they were apprehended, and was identified by them as the currency they had been given by Lieutenant Walter Kappe of the German High Command. They further admitted they were instructed by Lieutenant Kappe to wear their German Marine Infantry uniforms while landing, and some have testified that they were told that if caught while landing, they would be treated as prisoners of war.

On July 2, 1942, the President of the United States, as President and Commander in Chief of the Army and Navy, issued a precept, a copy of which is attached to each of the petitions as Exhibit A, appointing a Military Commission to try these eight men for offenses against the Law of War and the Articles of War. The Commission so appointed is composed of Major General Frank R. McCoy, President, Major General Walter S. Grant, Major General Blanton Winship, Major General Lorenzo D. Gasser, Brigadier General Guy V. Henry, Brigadier General John T. Lewis, and Brigadier General John T. Kennedy. By the same precept, the Attorney General of the United States and the Judge Advocate General of the Army were directed to conduct the prosecution of all eight of the accused persons.

On the same date and in the same precept the President of the United States appointed Colonel

Cassius M. Dowell and Colonel Kenneth Royall as counsel to defend the petitioners, and subsequent thereto, on or about July 6th, Colonel Carl M. Ristine was specially appointed as defense counsel for George John Dasch, one of the accused, not a petitioner here. The officers above mentioned entered upon their duties promptly upon their appointment and since that time have continuously been in the performance of such duties in defending the accused persons.

On July 2, 1942, the President under the seal of the United States issued a proclamation, a true copy of which is attached to each of the petitions as Exhibit B, denying access to our civil courts to certain enemies of the United States.

4. On July 3, 1942, each of the accused was served with and received in person a copy of certain charges and specifications preferred against him under the Law of War and the Articles of War. These charges and specifications were executed under oath by H. Granville Munson, Colonel, U. S. Army, as accuser, and duly subscribed and sworn to by him before Major General Myron C. Cramer, the Judge Advocate General of the Army. A copy of these charges and specifications is attached to each of the petitions as Exhibit E.

5. The Military Commission appointed by the President met on July 8, 1942, in the City of Washington, District of Columbia, as directed in the precept referred to above, and began the trial of the eight persons so accused.

6. The prosecution presented evidence against the accused, totalling some 1,500 pages in the record of the proceedings, and introduced 259 exhibits, including the boxes of explosives and their contents, the uniforms, currency and other articles identified by the accused. The case for the prosecution occupied some ten days in its presentation. Opportunity was given to the defense counsel to cross-examine the prosecution's witnesses, and full opportunity for argument was given to defense counsel upon every ruling of the Commission. Prior to July 8, 1942, each of the accused had signed one or more written statements outlining the training he had received at the sabotage school, describing his trip by submarine, and outlining his actions in the United States after landing. These statements were introduced in evidence by the prosecution. With reference to their course of training, their trips, and their landings in the United States, there is no substantial point of contradiction in the stories told by the eight accused.

Both prosecution and accused have offered all of their evidence and have so stipulated on the record before the Commission.

7. All of the accused persons contend that they had no intention to obey the orders given them as heretofore set forth. The Military Commission received evidence offered by such defendants, including the voluntarily offered testimony

of each of the accused, in an effort on their part to establish lack of intent.

8. The eight persons accused passed through the defense lines of the United States and landed on our coasts as set forth above. The eastern coast of the United States, including Long Island and Florida, is a defense command and part of the theatre of operations of the United States armed forces, and the beaches on which the petitioners landed were at that time patrolled by the Coast Guard (at Amagansett) and the Army (at Ponte Vedra) for the purpose, *inter alia,* of detecting landings of enemy agents from submarines. At sea, this coast is guarded by the United States Navy.

9. The charges and specifications served on the accused as heretofore set forth enumerate various offenses against the Law of War and the Articles of War. Whether the accused have violated the criminal statutes of the United States is immaterial and irrelevant. They have been charged and are being tried before a military commission for offenses properly cognizable by such a commission.

10. For specific answer to paragraph 3 of each of the petitions, respondent denies that the causes and pretexts of the detention of the petitioners are those set forth in said paragraph, but alleges that he holds the petitioners under authority of a certain order from the Secretary of War dated July 3, 1942, directing the respondent, in his official

capacity, to take, receive, and keep in custody until further orders, said petitioners, by virtue of which order said petitioners were placed in confinement by this respondent and have so been kept in such confinement since the date of said order, and by reason of the facts and authorizations hereinafter particularly set forth.

11. Custody of the eight accused was transferred to this respondent by the Federal Bureau of Investigation on July 1, 1942, pursuant to a directive of the Attorney General signed on July 3, 1942, a copy of which is attached to each of the petitions as Exhibit C. The respondent was ordered to receive and keep said persons in custody by the Secretary of War. A copy of this order is attached to each of the petitions as Exhibit D. The respondent now holds by virtue and authority of the last-mentioned order the eight persons accused, for trial before the Military Commission above described, and produces them at all proceedings before said Military Commission, at which all said persons have been present. Each of the accused thus has heard all of the evidence presented against him. Each of the accused is permitted to confer with his counsel, and his counsel have been permitted to confer with witnesses for the prosecution, during the trial and at other times.

12. Respondent admits that the civil courts of the United States are open and functioning. He also admits that the original arrest of the eight accused was made by the Federal Bureau

of Investigation, and that each of the accused signed certain waivers, copies of which are attached to each of the petitions as Exhibits F, G, and H.

13. The petitioner Burger was born in Germany in 1906. He entered the United States with a German passport on an immigration quota visa in 1927. He filed a declaration of intention to become a citizen later in that year. A certificate of citizenship was issued to him in 1933. Four or five months thereafter he returned to Germany with an American passport, and remained there until he left for this country on the submarine which landed at Long Island on June 13, 1942.

Burger joined the German Army as a private on August 7, 1941, and at that time took an oath of loyalty to Adolf Hitler, Chancellor of the German Reich. He remained in the military service of the German Reich when he entered the sabotage school, and he is still a member of the German Army.

14. The petitioner Haupt was born in Germany in 1919. His father, also of German birth, came to this country in 1923 under an immigration visa. The father filed a declaration of intention to become a citizen in that year. Herbert Haupt entered the United States with his mother in 1925. His father became a naturalized citizen in 1930. Haupt remained in the United States until June 1941, at which time he went to Mexico. He sought to obtain an American passport for this trip but was not able to obtain one. He went to Mexico,

he says, because of personal difficulties and because he wished to obtain work in Mexico or Nicaragua. After staying five or six weeks in Mexico, he attempted to obtain permission to go to Guatemala or Nicaragua, but was not able to obtain such permission. Not having ample funds and not being able to obtain work in Mexico he went to the German Consul in Mexico City for assistance. The consul advised him that he could obtain employment under German auspices in Japan. He thereupon sailed in July or August 1941 from Mexico to Japan, traveling on a Japanese vessel at the expense of the German Government, and carrying a German passport. After a short stay in Japan, he was given employment on a German vessel. He states that the destination was not revealed to him at the time he started service. At sea he transhipped to another German vessel, which ran the blockade and landed at Bordeaux, France, in December 1941. Haupt states that he was not told of the destination of this second vessel until he had been at sea on it for some days. Haupt proceeded from Bordeaux to Stettin, Germany. He received the Iron Cross, second class, from the German Government for his service on the vessel, as he had been helpful in aiding it to run the blockade. He also received another decoration from the German Government at about the same time.

He states that he was not allowed to obtain gainful employment in Germany, and that when, sometime in March 1942, he was offered an opportunity to join the sabotage school maintained by Lieutenant Walter Kappe of the German High Command, he accepted the offer. He claims that he did so with the intention of coming back to the United States, and that he did not intend to go through with any attempts at sabotage in this country.

He stated that while on the submarine he decided to inform the American authorities about the mission of the eight accused and their arrival and whereabouts in this country. He landed on June 17, 1942, and proceeded to Chicago. On June 22, he called at the offices of the Federal Bureau of Investigation in Chicago and explained to them that he had not yet registered for the draft because he had been in Mexico for the past year. He admits that he lied in so stating, and that he did not tell the Bureau that he had been in Japan or Germany. He states he did not inform the Bureau about the mission of the eight accused at this time because he was nervous and afraid, and wanted to think things over. He stated that he intended to inform the Bureau after July 6, 1942, when Dasch and the petitioner Kerling were to meet in Chicago, but he was apprehended by the Bureau on June 27, 1942. He admits he saw at least six people in Chicago,

including his father, mother, uncle, and aunt, all of whom knew he had just returned from Germany aboard a submarine with others, but admits he told none of them of his intention to inform the authorities.

The petitioner, Burger, testifying on his own behalf before the Military Commission, stated on cross examination that he was told by Lieutenant Walter Kappe of the German High Command, who recruited and supervised the training and departure of the eight accused, that each of the accused was assigned to a German Army unit before his departure.

15. The petitioners, Burger and Haupt, for the reasons stated in the foregoing paragraphs, are not citizens of the United States. By their entire course of conduct Burger and Haupt have forfeited any claim to American citizenship and must be treated as subjects of the German Reich and, in any event, as enemies of the United States.

16. Respondent admits that on July 28, 1942, the petitioners applied to the Honorable James W. Morris, Associate Justice of the United States District Court for the District of Columbia, for leave to file petitions for writs of habeas corpus, and that, on the same day, by orders attached to each of the petitions presented to this Court, the applications to Judge Morris were denied, for the reasons stated in said orders.

17. Respondent denies the allegations contained in paragraphs 1 to 5 (j), both inclusive, in Burger's and Haupt's petitions, and those contained in paragraphs 1 to 5 (k), both inclusive, of the other petitions, except to the extent that any of these allegations are specifically admitted in the preceding paragraphs of this answer. As to paragraph 5 (k) of Burger's and Haupt's petitions, and paragraph 5 (l) of the other petitions, the respondent has no knowledge or information sufficient whereon to base an answer, and therefore neither admits nor denies the allegations contained therein.

18. Respondent asks that paragraph 5 of the petitions be rejected in its entirety, for the following reasons:

(a) Except as set forth in paragraphs 1–16, of this answer, it contained no allegations of fact that may not be judicially noticed by the court;

(b) It alleges numerous unfounded conclusions of law, which are answered fully in respondent's brief;

(c) It presents a case by its terms arising "in the land or naval forces" within the meaning of the Fifth Amendment to the United States Constitution;

(d) It raises numerous questions concerning the admissibility and sufficiency of the evidence pre-

sented to the Military Commission, which are matters solely for the determination of that body.

19. The respondent, further answering, says that the petitions should be rejected in their entirety for the following reasons:

(a) The petitioners have no capacity to sue in this Court or in any other court;

(b) The petitioners are enemies of the United States and are without any right, standing, or capacity to sue in this Court for a writ of habeas corpus or other relief;

(c) The petitioners, having entered service of a nation with which the United States is at war, having taken up arms against the United States, and having as part of a hostile force, invaded the United States and waged war on the United States, as more fully appears from the petitions and exhibits attached thereto, have no right to maintain their petitions for a writ of habeas corpus and have no capacity to maintain any action or suit in the courts of the United States;

(d) The petitions state no grounds for the release of the petitioners from the custody of respondent;

(e) This Court is without jurisdiction to disturb the respondent in his right to lawful custody of the petitioners vested in him by virtue of the laws of war and the lawful orders of his superiors;

(f) This Court is without jurisdiction to interfere with the due and orderly proceedings of the

Military Commission duly constituted by the President of the United States of America and Commander in Chief of its armed forces to inquire into the hostile acts committed by the petitioners as enemies of the United States within a zone of military operations in time of war in violation of the laws of war and the Articles of War;

(g) The Military Commission has jurisdiction over the persons of the petitioners and the offenses charged in the charges and specifications above referred to, and is legally convened and legally constituted;

(h) There has been no denial to the petitioners of any right to which they are entitled under the Constitution or laws of the United States.

WHEREFORE, having answered all and singular the matters and things presented to this honorable Court by the said petitions upon which are involved any issues of fact, said facts being uncontroverted; and having represented unto this honorable Court adequate reasons in law to justify the propriety of the confinement of said petitioners and the jurisdiction of the said Military Commission over their persons, and over the offenses with which they stand charged, and having established the legality of the appointment, constitution and proceedings of said Military Commission as a matter of law,

respondent prays that said petitions be hence dismissed.

Respectfully submitted,

ALBERT L. COX,
Brig. Gen., U. S. A.,
Provost Marshal of the Military
District of Washington,
Respondent.

FRANCIS BIDDLE,
Attorney General.

MAJ. GEN. MYRON C. CRAMER, U. S. A.,
The Judge Advocate General,
Attorneys for the Respondent.

OSCAR COX,
Assistant Solicitor General,

COL. ERWIN M. TREUSCH, U. S. A.,
GEORGE THOMAS WASHINGTON,
ROBERT S. STEVENS,
MYRES S. MCDOUGAL,
LLOYD N. CUTLER,
Of Counsel.

JULY 29, 1942.

UNITED STATES OF AMERICA,
District of Columbia, ss:

On the 29th day of July, 1942, before me, the undersigned, authorized by law to administer oaths, personally appeared Albert L. Cox, Brigadier General, U. S. A., Provost Marshal of the Military District of Washington, and made oath that he is the respondent referred to in the foregoing answer, that he has read and understands said answer, and has personally signed the same, and says that the said answer is true in substance and in fact.

_____ _____,
Notary Public, D. C.

My commission expires _____.

U. S. GOVERNMENT PRINTING OFFICE: 1942

BLANK PAGE

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 29 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

SPECIAL JULY TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN, AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

UNITED STATES EX. REL. ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

BRIEF FOR THE RESPONDENT

JULY 29, 1942

BLANK PAGE

INDEX

	Page
QUESTIONS PRESENTED	1
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND ORDERS INVOLVED	2
STATEMENT OF FACTS	6
SUMMARY OF ARGUMENT	8
ARGUMENT:	
Point I	13
Point II	28
Point III	37
Point IV	41
Point V	48
Point VI	53
CONCLUSION	62
APPENDICES:	
1. Constitutional Provisions, Treaties and Statutes Involved	63
2. Military Trials of Unlawful Belligerents	72
3. Analysis of the Charges	78
4. Citizenship of Burger and Haupt	84
5. Attorney General's Opinion of December 24, 1919	92

TABLE OF AUTHORITIES

CONSTITUTION

Article I, Sec. 8	34, 63
Article II, Sec. 2	34, 64
Article III	64
Amendment V	64
Amendment VI	64

TREATIES

Hague Convention No. IV of October 18, 1907 (proclaimed 36 Stat. 2295)	32, 65

STATUTES [1]

Habeas Corpus Act of 1863 (12 Stat. 755)	42
U. S. Code, Title 8, sec. 801	70
808	90
U. S. Code, Title 50 (appendix), sec. 2	18, 23, 69
7 (b)	18, 23
21	20, 69

[1] Citations to the Articles of War (10 U. S. C. §§ 1471–1593a) are too numerous to set forth.

Proclamations and Orders

	Page
Proclamation of President Lincoln, Sept. 24, 1862	35
Proclamation of President Roosevelt, July 2, 1942	2, 14, 22
Precept of President Roosevelt, July 2, 1942	4

CASES

Re Baranek, 33 Ont. L. Rep. 139 (1915)	19
Brown v. *United States*, 8 Cranch 110 (1814)	21
Carter v. *Roberts*, 177 U. S. 496 (1899)	60
Re Chamryk, 25 Man. L. Rep. 50 (1914)	19
Clark v. *Morey*, 10 Johns (N. Y.) 69 (1813)	16
Collins v. *McDonald*, 258 U. S. 416 (1922)	60, 61
Ex parte Colonna, 314 U. S. 510 (1942)	18
De Lacey v. *United States*, 249 Fed. 625 (C. C. A. 9th 1918)	21, 25
Ex parte Dunn, 250 Fed. 871 (D. C. Mass. 1918)	36
Dynes v. *Hoover*, 20 How. 65, 82 (1857)	60
Furly v. *Newnham*, 2 Doug. K. B. 419 (1780)	17
Re Gottesman, 41 Ont. L. Rep. 547 (1917)	19
Ex parte Graber, 247 Fed. 882 (D. C. Ala. 1918)	19
Grafton v. *United States*, 206 U. S. 333 (1907)	36
Greene v. *Secretary of State for Home Affairs* [1942] 1 A. C. 284 (1941)	49, 51
Gusetu v. *Date*, 17 Quebec Pr. 95 (1915)	19
Home Building and Loan Ass'n v. *Blaisdell*, 290 U. S. 398 (1934)	34
Johnson v. *Sayre*, 158 U. S. 109 (1895)	60
Juaragua Iron Co. v. *United States*, 212 U. S. 297 (1909)	21, 25
Keyes v. *United States*, 109 U. S. 336 (1883)	54
Kurtz v. *Moffitt*, 115 U. S. 487 (1885)	54, 60
Liversidge v. *Anderson* [1942] 1 A. C. 206 (1941)	49
Martin v. *Mott*, 12 Wheat. 19 (1827)	51
Ex parte Mason, 105 U. S. 696 (1881)	36
Miller v. *United States*, 11 Wall. 268 (1871)	21, 25
Ex parte Milligan, 4 Wall. 2 (1866)	10, 37, 40, 41
Minotto v. *Bradley*, 252 Fed. 600 (D. C. Ill. 1918)	19
Moyer v. *Peabody*, 212 U. S. 78 (1909)	51
Porter v. *Freudenberg* [1915] 1 K. B. 857	16
Prize Cases, 2 Black 635 (1862)	48
Ex parte Reed, 100 U. S. 13 (1879)	60
Rex v. *Knockaloe Camp Commandant*, 87 L. J. K. B. 43 (1917)	16, 19
Rex v. *Schiever*, 2 Burr. 765 (1759)	17
Rex v. *Superintendent of Vine Street Police Station* [1916] 1 K. B. 268	17, 19
Schaffenius v. *Goldberg* [1916] 1 K. B. 284	17
Sterling v. *Constantin*, 287 U. S. 378 (1932)	52
Swaim v. *United States*, 165 U. S. 553 (1897)	60
Sylvester's Case, 7 Mod. 150 (1703)	16

	Page
Three Spanish Sailors, 2 W. Bl. 1343 (1780)	17
United States v. *Curtiss-Wright Export Corporation*, 299 U. S. 304 (1936)	51
United States v. *Fletcher*, 148 U. S. 84 (1892)	60
United States v. *George S. Bush & Co.*, 310 U. S. 371 (1940)	51
United States ex rel. Wessels v. *McDonald*, 256 Fed. 754 (S. D. N. Y. 1920), app. dismissed, 256 U. S. 705 (1921)	36, 46, 77, 80
United States ex rel. Rojak v. *Marshall*, 34 Fed. (2d) 219 (W. D. Pa. 1929)	90
United States ex rel. Scimeca v. *Husband*, 6 Fed. (2d) 957 (C. C. A. 2d, 1925)	90
Venus, The, 8 Cranch 253 (1814)	24, 25
Ex parte Weber [1916] 1 K. B. 280, aff'd [1916] 1 A. C. 421	19
Ex parte Wildman, 29 Fed. Cases 1232 (1876)	39

SECONDARY AUTHORITIES

Birkheimer, Military Government and Martial Law (1904), 527	33, 77
Blackstone, 21 Ed., Vol. 1, ch. 10, p. 372	16
Burgess, Political Science and Comparative Constitutional Law (1900), 248–252	46
Carr, A Regulated Liberty (1942), 42 Col. L. Rev. 339	50
Corwin, The President: Office and Powers (2d ed. 1941)	46
Davis, A Treatise on the Military Law of the United States (1913), p. 302 footnote; pp. 307–310	31, 33, 77
Fairman, The Law of Martial Rule and the National Emergency (1942), 55 Harv. L. Rev. 1253	46, 49
Fairman, Martial Rule (1930)	47
The Federalist (Dawson Ed. 1863) 587	38
Fletcher, The Civilian and the War Power (1918), 2 Minn. L. Rev. 110, 126; 16 Op. Atty. Gen. 292 (1879)	39
Halsbury's Laws of England (2d ed., Vol. IX, p. 701, par. 1200; p. 710, par. 1212)	14, 15
Howland, Digest of Opinions of Judge Advocate General (1912), pp. 1070–1071 (pars. 5 and 6)	30, 76, 83
Moore, International Law Digest, 1906, vol. 3, p. 518; see also ibid., pp. 543–551	90
Morgan, Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War (1919), 4 Minn. L. Rev. 78, 107	39, 40
Oppenheim's International Law (Lauterpacht's 6th ed. 1940), 457	24, 40
Pomeroy, Constitutional Law (10th ed. 1888), 597	36
Risley, The Law of War, p. 108	80
Spaight, War Rights on Land, pp. 461–2	29

Page

Warren, The Supreme Court in United States History (1937), 418 45
Wiener, A Practical Manual of Martial Law (1940), 137 ..... 39, 40
Winthrop, Military Law and Precedents (1920) 27, 30, 39, 77, 79, 81, 82
American State Papers, Military Affairs, vol. I, pp. 721–734 73
13 American Journal of International Law 35 16
The Assassination of President Lincoln and the Trial of the Conspirators (1865) 74, 83
30 Calif. L. R. 358 (1942) 16
G. C. M. O. 107 of 1866 107
G. O. 14, Dept. of the East (1865) 74
G. O. 24, Dept. of the East (1865) 74
G. O. 30, Northern Dept. (1865) 74
G. O. 41 of 1864 74
G. O. 52, Dept. of the Pacific (1865) 74
30 Geo. L. J. 421 (1942) 16
3 Journals of Congress 135, 459 72
11 Ops. A. G. 297 (1865) 35
13 Ops. A. G. 59 (1869) 35
14 Ops. A. G. 249 (1873) 35
16 Ops. A. G. 292 (1879) 39
31 Ops. A. G. 356 (1918) 48
Instruction for the Government of Armies of the United States in the Field (G. O. 100, A. G. O. 1863) 31, 79, 80
Rules of Land Warfare (FM 27–10, War Dept., 1940) 17, 31, 32, 33, 78, 79, 80

In the Supreme Court of the United States

SPECIAL JULY TERM, 1942

IN THE MATTERS OF THE APPLICATIONS OF ERNEST PETER BURGER, HERBERT HANS HAUPT, HEINRICH HARM HEINCK, EDWARD JOHN KERLING, HERMANN OTTO NEUBAUER, RICHARD QUIRIN, AND WERNER THIEL FOR WRITS OF HABEAS CORPUS

UNITED STATES EX. REL. ERNEST PETER BURGER, ET AL., PETITIONERS

v.

BRIG. GEN. ALBERT L. COX, U. S. A., PROVOST MARSHAL OF THE MILITARY DISTRICT OF WASHINGTON, RESPONDENT

BRIEF FOR THE RESPONDENT

QUESTIONS PRESENTED

(1) Whether the petitioners, as military prisoners charged with being enemies who crossed our lines in time of war for hostile purposes, can seek writs of habeas corpus from the civil courts.

(2) Whether the Military Commission, appointed July 2, 1942, to try the petitioners, has jurisdiction over the offenses charged.

(3) Whether the Military Commission has jurisdiction over the petitioners' persons.

(4) Whether the manner in which the Military Commission was appointed, or its conduct of the trial, deprived the petitioners of any rights to which they are entitled.

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES INVOLVED

The Constitutional provisions, treaties, and statutes involved are set forth in Appendix I, *infra*, at pp. 63–71.

The President's Proclamation of July 2, 1942, and his precept of the same date creating the Military Commission read as follows:

DENYING CERTAIN ENEMIES ACCESS TO THE COURTS OF THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion,

or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its states, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this second day of July, in the year [SEAL] of our Lord nineteen hundred and forty-two, and of the Independence of the United States of America the one hundred and sixty-sixth.

FRANKLIN D. ROOSEVELT

By the President:
CORDELL HULL
Secretary of State

COMMANDER IN CHIEF OF THE ARMY AND NAVY

Washington, D. C.
JULY 2, 1942.

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, and more particularly the Thirty-Eighth Article of War (U. S. C., title 10, sec. 1509), I, Franklin Delano Roosevelt do hereby appoint as a Military Commission the following persons:

Major General Frank R. McCoy, President
Major General Walter S. Grant
Major General Blanton Winship
Major General Lorenzo D. Gasser
Brigadier General Guy V. Henry
Brigadier General John T. Lewis
Brigadier General John T. Kennedy

The prosecution shall be conducted by the Attorney General and the Judge Advocate General. The defense counsel shall be Colonel Cassius M. Dowell and Colonel Kenneth Royall.

The Military Commission shall meet in Washington, D. C., on July 8th, 1942, or as soon thereafter as is practicable, to try for offenses against the law of war and the Articles of War, the following persons:

Ernest Peter Burger
George John Dasch
Herbert Hans Haupt
Henry Harm Heinck
Edward John Kerling
Hermann Otto Neubauer
Richard Quirin
Werner Thiel

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any

judgment or sentence, shall be transmitted directly to me for my action thereon.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
July 2, 1942.

STATEMENT OF FACTS

The material facts are stated in respondent's Answer to the Petitions, submitted with this brief, and in the Stipulation between counsel for petitioners and counsel for respondent, submitted with this brief, stipulating that the facts stated in paragraphs 1 to 7, inclusive, of said Answer, are correct, and that other material facts recited in said Stipulation are correct.

The essential facts are as follows:

The seven petitioners are charged with being agents of the German Reich. All were born in Germany. All had lived in the United States for some period during their lives. All had returned to Germany between 1933 and 1941. After war was declared between the United States and the German Reich, the seven petitioners were recruited by an officer of the German High Command for training in a special school in the destruction of power lines, aluminum plants, bridges, railway and communication systems, and other key war facilities in the United States. They were also trained in the use of secret writing, for communication to Germany and among themselves in the United States.

Upon the conclusion of the training, the German Government contracted to pay them for acting on its behalf and transported them to the United States by submarines of the German Navy. Before boarding the submarines, the petitioners, and one George John Dasch, were separated into two groups of four each. One group went by submarine headed for Long Island. The other group went upon another submarine headed for Florida.

On the submarines, all wore fatigue uniforms of the German Marine Infantry, and were told that, if they were captured in these uniforms while landing, they would be treated as prisoners of war. If not captured immediately, they were to change to American-made civilian clothing.

Both submarines escaped our naval and other patrols and landed the petitioners under the cover of darkness. Three of the petitioners and Dasch landed in uniform near Amagansett, Long Island. The others landed in bathing trunks and uniform caps at Ponte Vedra, Florida.

Each group brought ashore boxes of explosives, incendiaries, fuses, detonators, and timing devices, and buried them in the sand near the points of landing.

Within two weeks after they landed, and while in civilian clothing, all seven petitioners and Dasch were taken into custody by special agents of the Federal Bureau of Investigation.

On July 2, 1942, the President set up a military commission to try the seven petitioners and Dasch for violation of the law of war and Articles 81 and 82 of the Articles of War (10 U. S. C. §§ 1553–4). On the same day, the President issued a proclamation denying access to the courts to certain enemies who crossed our fighting lines and were charged with committing or attempting to commit sabotage, espionage, or other hostile acts.

After the signing of the precept by the President, the Attorney General turned over the petitioners and Dasch to the military.

SUMMARY OF ARGUMENT

The petitioners are not entitled to access to our courts for the purpose of obtaining writs of habeas corpus. The great bulwarks of our civil liberties—and the writ of habeas corpus is one of the most important—were never intended to apply in favor of armed invaders sent here by the enemy in time of war. A jealous regard for this prerogative writ has been and should be maintained, to prevent prosecution for political opinions, and possible abuses of military power in periods of great stress and high emotional feeling. But no such inroads will result from denying the privilege to belligerent enemies charged with breaking through our lines to commit hostile acts.

The petitioners are paid agents, acting for and under the orders of the German Reich—a country

with which we are at war. They came to this country on enemy warships, dressed in the uniforms of the German Marine Infantry, hoping by this strategem of war to be given the treatment of prisoners of war in the event of capture. They crossed through our patrols with the very end and object of destroying our most vital war production and war transportation facilities. They are enemies in as practical a sense as parachutists or invading armies landed from an enemy fleet, though because of the nature of their war offenses they are not entitled to the consideration due lawful belligerents.

Those whom the enemy sends to destroy our industries and lives and the very existence of the Nation can hardly be in a position to claim constitutional rights, privileges, and immunities from the Nation which they seek to destroy. One privilege they seek is the freedom to ask our courts to help them now that they are caught.

Traditionally, all States in time of war have denied belligerent enemies access to their courts. That is one of the earliest and most rudimentary forms of political and economic warfare. It is an integral part of modern total warfare. And today the nation that will not wage total war usually meets total defeat.

Even if these petitioners were entitled to access to our courts, to test the validity of their detention, this Court should find that they may legally be

tried by the Military Commission set up for that purpose by the President.

By no stretch of interpretation can the doctrine of *Ex Parte Milligan,* 4 Wall. 2 (1866), be applied to these proceedings. Milligan never wore the uniform of the armed forces at war with the United States. The petitioners did. Milligan was continuously a resident of Indiana. He did not cross through the lines and enter into a theatre of operations. The petitioners were residents of Germany, and as agents of the German Government crossed our lines secretly in enemy warships for the purpose of committing hostile acts.

Milligan was charged with the commission of military offenses at a time when invasions gave their slow fore-warning months in advance. In the year 1942, we have had concrete experience with the swiftness of modern warfare. Experience—which should be plain by now—has demonstrated that the theatres of operations which existed in 1864 are not the theatres of operations of 1942. Wars today are fought on the total front, on the battlefields of joined armies, on the battlefields of production, and on the battlefields of transportation and morale, by bombing, the sinking of ships, sabotage, spying, and propaganda.

Military orders setting up zones of operations are hardly necessary to attest the fact that the enemy submarines crossed our lines into a "theatre of operations". We know from the common fact

of sinkings of our merchant ships by submarines on our whole East Coast that our defenses are daily being pierced. We know that the two submarines were able to cross our lines and land these men on our patrolled shores. We know that our whole East Coast is a theatre of operations in substantially the same sense as the North Atlantic or the British Isles. The East Coast of today is a far cry from the Indiana of Milligan in 1864.

The Articles of War specifically provide that violations of those Articles and of the law of war by persons not members of our armed forces can be tried by military commissions. The President, under his oath to protect and defend the United States against its enemies, had the clear duty to meet force with force and to exercise his military authority to provide a speedy, certain and adequate answer, long prescribed by the law of war, to this attack on the safety of the United States by invading belligerent enemies. The Military Commission was his answer to this incursion.

These petitioners—as belligerent enemies—can be tried by the Military Commission and, by the same token, are not entitled to any constitutional right to a trial by jury or to the other similar rights which they assert. Under time-tested principles of our common law and the international law of war, their status as belligerent enemies, their purposes and their acts deprive them of the benefits which they now demand of the State which they sought

to destroy. In addition, the Constitution itself provides that, in cases arising in the land or naval forces, the normal constitutional guarantees do not apply. Our own soldiers and sailors can assert none of these guarantees when charged with military offenses. It would be fantastic to extend such privileges to invading soldiers of the enemy.

The history of military tribunals before the Constitution was adopted, the adoption of the Constitution with specific exception in such cases, and the passage by the Congress of the Articles of War, make it clear beyond a doubt that, in cases such as these, a trial by military commission is valid and proper.

Under the exercise of the President's powers as Commander in Chief, and by express statute, military commissions need not follow the procedure of courts-martial, nor need they give to belligerent enemies the rights which are afforded by statute to the members of our own armed forces, such as the right of peremptory challenge and the rule that the death sentence must be by unanimous decision. Rights and privileges accorded to our residents—including those who disagree with us—should not be granted to belligerent enemies who, in time of war, enter this country in order to destroy it by acts of war.

ARGUMENT

I

THE PRISONERS ARE INVADING ENEMIES WITH NO PRIVILEGE TO PETITION FOR THE WRIT OF HABEAS CORPUS

The petitioners are enemies requesting this Court to invoke constitutional guarantees to protect them from speedy military punishment for the offenses with which they are charged. Some of the guarantees which they seek are not even available to our own soldiers. None of them is available to invading soldiers of the enemy.

The first of the "rights" upon which petitioners rely is the privilege of presenting a petition for habeas corpus to this Court.

These petitioners, as enemies who crossed our borders after the declaration of war, have no legal right to ask this Court, by habeas corpus or otherwise, to inquire into the lawfulness of their detention.

The President's proclamation of July 2, 1942, printed at page 2, *supra,* is an affirmation of a long-settled rule denying belligerent enemies any access to our courts. In support of this proclamation and its conclusive effect on these petitions, respondent contends:

A. Enemies who invade this country in time of war have no privilege to question their detention by habeas corpus.

B. In any event, whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President.

C. The prisoners fall squarely within the terms of the President's proclamation.

A. *Enemies who invade this country in time of war have no privilege to question their detention by habeas corpus.*

This contention is confined to enemies who invade this country after war begins. Its applicability to foreign nationals who are residents of this country, and have been since war began, need not be considered in passing upon these petitions.

The general nature of the writ of habeas corpus is thus described by Halsbury:

> The writ of *habeas corpus ad subjiciendum,* which is commonly known as the writ of *habeas corpus,* is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. It is a prerogative writ by which the King has a right to inquire into the causes for which any of his subjects are deprived of their liberty. By it the High Court and the judges of that Court, at the instance of a subject aggrieved, command

> the production of that subject, and inquire into the cause of his imprisonment.—Halsbury's Laws of England (2d. Ed., Vol. IX, p. 701, par. 1200).

It will be noted that throughout this descriptive statement the privilege of the writ is said to be that of "subjects." It is ancient doctrine that in time of war enemies—persons who are subjects of a country with which we are at war, or who are subject to its orders, and who enter this country after war begins—are not entitled to these privileges and are not entitled to access to the courts.

Halsbury also points out that the writ of habeas corpus:

> * * * will not be granted * * * after conviction by a duly constituted court-martial the proceedings of which have been in due course confirmed by the competent authority; or to an alien enemy who is a prisoner of war; * * *—Halsbury's Laws of England (2d Ed., Vol. IX, p. 710, par. 1212).

The rule denying invaders the writ of habeas corpus is part of the historic and practical policy of denying certain enemies access to our courts. This broad policy has been relaxed in modern times in a very limited class of cases, to permit enemy nationals to have access to the courts in cases of civil litigation for the enforcement of pecuniary claims whenever the enemy nationals can be said to have been residing in the country with the license

of the sovereign authority. (See Blackstone, 21 Ed., Vol. 1, ch. 10, p. 372.)[6]

But the privilege of access to the courts even for the enforcement of pecuniary claims has been granted only to enemy nationals who are lawfully residents of this country. It has never been granted to an enemy who unlawfully enters the country after the declaration of hostilities and certainly not where there is reasonable cause to believe the illegal entry is for a hostile purpose. As said in *Sylvester's Case,* 7 Mod. 150 (1703):

> If an *alien enemy* come into *England* without the queen's protection, he shall be seized and imprisoned by the law of *England,* and he shall have no advantage of the law of *England,* nor for any wrong done to him here * * *.

In *Rex* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. 43 (1917), Avery, J., wrote:

> In my opinion decisions whether or not persons are alien enemies for the purpose of determining their right to sue in our Courts are foreign to the point which is before us today. There is clear authority that a person who is an alien enemy prisoner of war is not entitled to apply to the

[6] A discussion of the origin of the rule and of the evolution of its change will be found in *Porter* v. *Freudenberg* [1915] 1 K. B. 857. See also *Clark* v. *Morey,* 10 Johns. (N. Y.) 69 (1813); 13 American Journal of International Law 35; 30 Geo. L. J. 421 (1942); 30 Calif. L. R. 358 (1942).

> Court for a writ of *habeas corpus.* (87 L. J. K. B., at 46.)

In *Rex* v. *Schiever,* 2 Burr. 765 (1759), *Furly* v. *Newnham,* 2 Doug. K. B. 419 (1780), and the *Three Spanish Sailors,* 2 W. B. 1324 (1779)—all decided before our own Constitution was adopted—it was held that no writ of habeas corpus will be granted for prisoners of war. To the same effect are *Rex* v. *The Superintendent of Vine Street Police Station* [1916] 1 K. B. 268, and *Schaffenius* v. *Goldberg* [1916] 1 K. B. 284, in which Lord Justice Warrington wrote:

> The authorities that have been cited to us with regard to prisoners of war in old times only go to this, that the prisoner of war could not sue out a writ of habeas corpus. Of course nobody now disputes that. ([1916] 1 K. B. 284, at 305.)

If prisoners of war are denied the privilege of requesting the writ of habeas corpus, it is inescapable that the seven petitioners are not entitled to request the writ. Under international law, they are not even entitled to treatment as prisoners of war. *Rules of Land Warfare* (U. S. General Staff, 1940) pars. 9, 70, 351, 352, 356. By removal of their uniforms before their capture these petitioners lost the possible advantages of being prisoners of war. Surely they did not thus acquire a privilege even prisoners of war do not have.

In January of this year this Court held that the incapacity of an enemy national or enemy government to sue in our courts deprived the Italian government or its ambassador of the privilege of the prerogative writs of prohibition and mandamus, even on application to the original jurisdiction of this Court. *Ex parte Colonna,* 314 U. S. 510 (1942).

In denying the petitioner's application, the Court, referring to the definition of "enemy" in Sec. 2 of the Trading With the Enemy Act and to the provisions of Sec. 7 (b) of that Act (Oct. 6, 1917, ch. 106 §§ 2, 7 (b); 40 Stat. 411, 416; 50 U. S. C. appendix, §§ 2, 7 (b)), said in a *per curiam* opinion:

> This provision was inserted in the Act in the light of the principle, recognized by Congress and by this Court, that war suspends the right of enemy plaintiffs to prosecute actions in our courts. * * * In view of the statute and the opinions in the cases cited, the application will not be entertained. * * * (314 U. S., at 511.)

It is to be noted that the privilege denied to Colonna was not the privilege to commence an ordinary lawsuit. Colonna sought the privilege of the prerogative writs of prohibition and mandamus. The writ of habeas corpus falls into the same class.

B. *In any event, whatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President.*

It has been held by our courts that alien enemies—even those lawfully resident in this country

since war began—have no privilege of habeas corpus to inquire into the cause of their detention by the Government as dangerous persons. *Ex parte Graber,* 247 Fed. 882 (D. C. Ala. 1918); *Minotto* v. *Bradley,* 252 Fed. 600 (D. C. Ill. 1918). See also *Ex parte Weber,* [1916] 1 K. B. 280, affirmed in the House of Lords, [1916] 1 A. C. 421; *Rex* v. *Superintendent of Vine Street Police Station,* [1916] 1 K. B. 268; *Rex.* v. *Knockaloe Camp Commandant,* 87 L. J. K. B. N. S. 43 (1917); *Re Chamryk,* 25 Man. L. Rep. 50 (1914); *Re Beranek,* 33 Ont. L. Rep. 139 (1915); *Re Gottesman,* 41 Ont. L. Rep. 547 (1918); *Gusetu* v. *Date,* 17 Quebec Pr. 95 (1915).

But even if enemies lawfully resident here could assert this privilege, and even if these prisoners who came through the lines were regarded as in that category, the privilege is still one held by "license" of the Executive, and can be taken away at any time.

In *Rex* v. *Superintendent of Vine Street Police Station, supra,* [1916] 1 K. B., at p. 279, Low, J., after referring to the fact that the petitioner was in a position similar to that of an enemy resident in England under license from the crown, said:

> That license, however, can be terminated at any time by the Crown, and, although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the license.

The similar authority of the President to take the license from lawful enemy residents is confirmed by the Act of July 6, 1798, now 50 U. S. C. § 21:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject * * * and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

Speaking of this act, the court in *De Lacey* v. *United States*, 249 Fed. 625 (C. C. A. 9th, 1918) said:

> * * * although occasion has seldom arisen to enforce the statute, no question has been made of its constitutionality. While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. * * * There is nothing in the Constitution or laws of the United States which in any way has changed the common-law rule, or restricted the power of Congress to enact the alien enemy law. Power to enact such a law may at times be essential to the preservation of the government, and the right of all nations to exercise it is recognized in international law (p. 626).

The fact is that ordinary constitutional doctrines do not impede the Federal Government in its dealings with enemies. This principle was clearly stated by Chief Justice Marshall in *Brown* v. *United States,* 8 Cranch 110 (1814):

> Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded (pp. 122–123).

The law has remained the same throughout the subsequent wars in which the United States has been engaged. *Miller* v. *United States,* 11 Wall. 268 (1871) (Civil War); *Juragua Iron Co.* v. *United States,* 212 U. S. 297 (1909) (Spanish-

American War); *De Lacey* v. *United States*, 249 Fed. 625 (C. C. A. 9th, 1918) (World War).

The President's power over enemies who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.

In his Proclamation of July 2, 1942, the President took the action he deemed necessary to deal with persons he and the armed forces under his command reasonably believe to be enemy invaders. He declared that all such persons should be subject to the law of war and triable by military tribunals. He removed whatever privilege such persons might otherwise have had to seek any remedy or maintain any proceeding in the courts of the United States.

These acts were clearly within his power as Commander in Chief and Chief Executive, and were lawful acts of the sovereign—the Government of the United States—in time of war.

C. *The prisoners are enemies who fall squarely within the terms of the President's proclamation.*

1. ALL OF THE PRISONERS ARE SUBJECTS, CITIZENS, OR RESIDENTS OF GERMANY, AND ENEMIES OF THE UNITED STATES

The prisoners admit that at all times between December 9, 1941, and May 26, 1942, they resided in Germany or in German-occupied territory.

Residents of Germany must after the declaration of war be regarded for most purposes—including the present—as enemies of the United

States. The Trading with the Enemy Act of 1917 is declaratory of this principle. Section 2 of that act includes within the definition of "enemy" for the purpose of that Act, "Any individual, partnership, or other body of individuals, *of any nationality,* resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war." (50 U. S. C., appendix, § 2; italics added.)

Section 7 (b) of the same Act then goes on to state:

> Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof [which relates to patent, trade-mark, and copyright suits] * * * *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him. (50 U. S. C., appendix, § 7 (b).)

To whatever extent the President has power to bar enemies from seeking writs of *habeas corpus,* he clearly has power to define "enemy" as including a class as broad as that described in the Trading with the Enemy Act.

Even if it be assumed that Burger and Haupt are citizens of the United States, this does not change their status as "enemies" of the United States. Enemy character does not depend, in all

instances, upon citizenship. Any person, no matter what his nationality by ordinary peace-time standards, is considered to be an enemy if he willingly resides in the territory of the enemy nation and does not within a reasonable time make an effort to assert his non-enemy character. If he actively aids the enemy nation, and, *a fortiori,* if he undertakes belligerent actions on its behalf, he is impressed immediately with the character of an enemy. Hall, *International Law* (1909), pp. 490–497; Oppenheim, International Law (1940), Vol. II, pp. 216–218.

It has long been held by the courts of the United States that this rule applies to all persons living in enemy territory, even if they are technically United States citizens. The Supreme Court, in *The Venus,* 8 Cranch 253 (1814), approved the English rule that "whilst an Englishman, or a neutral, resides in a hostile country, he is a subject of that country, and is to be considered, (even by his own or native country, in the former case) as having a hostile character impressed upon him" (8 Cranch, at pp. 278–9). Discussing the position of such a person, Justice Washington said:

> It is contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance * * *. This doctrine is believed to be as unfounded in reason and

> justice, as it clearly is in law. * * * It is his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; * * * (p. 283).

It has been the settled doctrine, since that case, that an American citizen may be treated as any other enemy of the United States, if he remains domiciled and at liberty in enemy territory after the outbreak of hostilities. *Miller* v. *United States,* 11 Wall. 268 (1871); *Juragua Iron Company* v. *United States,* 212 U. S. 297, 308 (1909). The return of Burger and Haupt to the United States cannot by any possibility be construed as an attempt to divest themselves of their enemy character by returning to the United States to reassume their duties as citizens. By their actions, they have placed themselves clearly and affirmatively in the category of enemies of the United States. Even if they have not lost their citizenship, therefore, they are entitled to no different treatment than any other enemy of this country.

If citizens merely residing abroad can be classified as enemies for purposes of access to the courts, certainly citizens residing abroad who act under the direct orders of a Government with which we are at war and come here by submarine through our lines to blow up our war facilities are enemies in the most realistic sense of the term.

The alleged American citizenship of Burger and Haupt is therefore irrelevant: all of the prisoners

are charged on reasonable grounds with being invading belligerent enemies of the United States, and are not entitled to access to our civil courts.

In any event, Burger and Haupt have forfeited any claim to American citizenship, for the reasons stated in Appendix IV of this brief.

2. THE PRISONERS DURING TIME OF WAR ENTERED THE UNITED STATES THROUGH COASTAL OR BOUNDARY DEFENSES

Three of the prisoners (Burger, Quirin, and Heinck) admit that they entered the United States near Amagansett, Long Island, on the night of June 12–13, 1942, after the declaration of war between the United States and Germany.

The remaining four (Kerling, Haupt, Neubauer, and Thiel) admit that they entered the United States near Ponte Vedra Beach, Florida, on the night of June 16–17, 1942, after the declaration of war between the United States and Germany.

It is conceded:

(a) That from June 12 through June 17, 1942, Amagansett and Ponte Vedra Beach were (and are) both within the Eastern Defense Command established by the United States Army of which fact public proclamation was made on May 16, 1942. (Stipulation, par. 8.)

(b) That on June 12–13, 1942, Amagansett was within the Eastern Sea Frontier and that on June 16–17, 1942, Ponte Vedra Beach was within the

Gulf Sea Frontier as established by the United States Navy. (Stipulation, par. 8.)

(c) That on June 12–13, 1942, the United States Coast Guard regularly patrolled the beaches surrounding Amagansett under written orders mentioning the purpose, *inter alia,* of detecting landings from enemy vessels. (Stipulation, par. 8.)

(d) That on June 16–17, 1942, the United States Army regularly patrolled the beaches surrounding Ponte Vedra Beach, Florida, under written orders mentioning the purpose, *inter alia,* of detecting enemy agents landing from submarines. (Stipulation, par. 8.)

3. THE PRISONERS ARE CHARGED WITH COMMITTING OR ATTEMPTING OR PREPARING TO COMMIT SABOTAGE, ESPIONAGE, HOSTILE, OR WARLIKE ACTS, OR VIOLATIONS OF THE LAW OF WAR

The Charges and Specifications placed before the Military Commission need not be elaborated here. They are attached as Exhibit E to each of the petitions, and are fully discussed in Appendix III of this brief.

The circumstances of this case abundantly establish that the military authorities had reasonable grounds for making the charges. The petitioners have admitted that they came here by German submarines, wore German naval uniforms until landing, brought boxes of explosives and other destructive implements ashore, had been trained and instructed to destroy American war facilities and to

communicate information to the enemy and to each other; to prevent apprehension, to get others to come here for similar work and otherwise to further their mission of destruction. Nothing but a plea of guilty could lay a more conclusive basis for the charges.

II

THE OFFENSES CHARGED AGAINST THESE PRISONERS ARE WITHIN THE JURISDICTION OF THIS MILITARY COMMISSION

Spies and other war offenders who cross our lines in time of war are triable before a military tribunal. This does not mean that they have not also committed offenses cognizable by the civil courts. It simply means that in time of war the trial of spies and similar offenders is a form of combat; it is not part of the recognized judicial system.

It has been the usage and custom of war since time immemorial for belligerents to establish military tribunals to deal swiftly and inexorably with spies and other war offenders. The principles and doctrines which these tribunals have invoked are part of the law of war, something entirely distinct from the civil law.

Some of the provisions of the law of war have been enacted by Congress into statutory form and are codified in the Articles of War (10 U. S. C., §§ 1471–1593a). Certain of the Articles

of War which codify the law of war apply to members of the military establishment and civilians alike, e. g., Articles 81 and 82 (10 U. S. C., §§ 1553–4). These statutes will be discussed at length in other parts of this brief.

But the law of war, like civil law, has a great *lex non scripta,* its own common law. This "common law of war" (*Ex parte Vallandigham,* 1 Wall. 243 (1863) at 249) is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers and civilians during time of war. Winthrop, *Military Law and Precedents* (1920), 17, 41, 42, 773 ff.[6]

The law of war has always been applied in this country. During the Revolutionary War, when Major André of the British Army was apprehended behind the American lines wearing civilian clothes and bearing information concerning the

---

[6] "Observance of the rules of International Law," says Spaight, "rests upon the conscience of each nation and the might of its arm. * * * If the laws of war are broken, there are three possible methods of obtaining satisfaction to be considered:—(1) The damaged belligerent may himself punish the offending enemy soldiers or nationals * * *.

"As to the case coming under (1) above, nothing need be said, except that the punishment of offenders, however manifest and grave their offence, should take place only after a fair trial—by a military court, a council of war, or whatever kind of courts has cognisance of offences against war law in each army; and that sentences of death should invariably be subject to the approval of the commander-in-chief."—Spaight, *War Rights on Land* (1911) 461–2.

defenses of the fort at West Point, a military court of inquiry found that the accused "ought to be considered as a spy from the enemy, and that, agreeable to the law and usage of nations, he ought to suffer death."[7]

The offense for which Major André was convicted—passing through our lines in civilian dress, with hostile purpose—is one of the most dangerous offenses known to the law of war. An enemy soldier in uniform can be recognized and dealt with; an enemy soldier disguised as one of our own civilians is a menace capable of incalculable harm. The other offenses here charged—appearing behind the lines in civilian guise, spying, relieving the enemy, and conspiracy—are of equal virulence and demand equally severe punishment.

For example, during the Civil War, a great number of similar offenses against the laws and usages of war, such as "coming within the lines of the army from the enemy without authority; * * * burning, destroying, or obstructing railroads, bridges, steamboats, etc., used in military operations; * * * conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy," were tried and punished by military commissions.[8] *Digest of Opinions of Judge Advocate General,* Howland

[7] Proceedings published, Philadelphia, 1780; reprinted, Albany, 1865. Winthrop, *supra*, p. 518.

[8] "Offenses against the law of non-intercourse between the belligerents in time of war are no less such when committed

(1912), pp. 1070–1071. Cf. *Instruction for the Government of Armies of the United States in the Field* (G. O. 100, A. G. O. 1863) Sec. I, par. 13; Davis, *Military Law of the United States* (1913), p. 310.

The best definitions of the offenses against the common law of war charged here are contained in the Rules of Land Warfare (FM 27–10, War Department, 1940), published as an official text on the law of war, for the use of our Army, from which the following extracts are taken:

RULES OF LAND WARFARE

348. *Hostilities committed by individuals not of armed forces.*—Persons who take up arms and commit hostilities without having complied with the conditions prescribed by the laws of war for recognition as belligerents are, when captured by the injured party, liable to punishment as war criminals.

* * * * *

351. *Unauthorized belligerents.*—Men and bodies of men, who, without being lawful

---

by foreigners than when committed by citizens. Thus where certain persons made their way early in the late war from Scotland to South Carolina, engaged for a considerable period in the manufacture of treasury notes for the Confederate authorities, and at the end of their employment came secretly and without authority into our lines with the design of returning to their home, *held* that, though British subjects, they had identified themselves with the cause of the enemy, and were properly amenable to trial for the offense of penetrating our military lines in violation of the laws of war. *Ibid.* (Dig. J. A. Gen.), 469, par. 4. See, also, pars. 5 and 6, *ibid.*" (Davis, *Military Law* (1913), p. 302, footnote).

belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper.

352. *Armed prowlers.*—Armed prowlers, by whatever names they may be called, or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing, or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war.

These provisions have explicit congressional recognition under Article of War 15 (10 U. S. C. § 1486), which preserves the jurisdiction of military tribunals over all "offenses" and "offenders" punishable under "the law of war." Furthermore, the definition of *lawful* belligerents appearing in the Rules of Land Warfare (Rule 9) was adopted by the signatories to the Hague Convention in Article I, Annex to Hague Convention No. IV of Oct. 18, 1907, Treaty Series No. 539, and was ratified by the Senate of the United States. 36 Stat. 2295 (1911).* Our Government

*See Appendix I, *infra*.

has thus recognized the existence of a class of *unlawful* belligerents. These unlawful belligerents, under Article of War 15, are punishable under the common law of war.

From time immemorial, offenses of the sort here charged have been regarded as the province of military courts. About 1847, General Winfield Scott established the "military commission" and the "council of war" to try these offenses. During the Civil War, these tribunals were united into what has been known ever since as the "military commission." Trial by military commission is firmly established as proper under the law and usage of war. *Rules of Land Warfare, supra,* pars. 9, 351, 356; Davis, *supra,* pp. 307–310; Winthrop, *supra,* pp. 831 ff; Birkheimer, *Military Government and Martial Law* (1904), pp. 527 ff.

As this Court stated in *Ex parte Vallandigham,* 1 Wall. 243 (1863), at 249:

> * * * military jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war. "Military offences, under the statute, must be tried in the manner therein directed; but military offences, which do not come within the statute, must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local law of each particular county."

> In the armies of the United States, the first is exercised by courts martial, while cases which do not come within the "rules and regulations of war," or the jurisdiction conferred by statute or court martial, are tried by *military commissions.*

Military commissions in the United States derive their authority from the Constitution as well as statutes, military usage, and the common law of war. Article I of the Constitution empowers Congress to "declare War * * * and make Rules concerning Captures on Land and Water," to "make Rules for the Government and Regulation of the land and naval Forces," to "repel Invasions," to "define and punish * * * offences against the Law of Nations," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." By Article II, Section 2 (1), the President is made "Commander in Chief of the Army and Navy of the United States." These sections divide between Congress and the President control over all the many activities necessary to the effective prosecution of war. Divided though this power may be, there can be no question but that there is lodged in the two together, in the words of Chief Justice Hughes, the "power to wage war successfully." *Home Building and Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 426 (1934). In this case the powers of both the President and Congress are being exercised in harmony for that purpose.

Military commissions have been acknowledged by congressional statutes which have recognized them as courts of military law. Articles of War 15, 38, 8_, 82; 10 U. S. C. §§ 1486, 1509, 1553, 1554. Their authority has also been recognized in presidential proclamations and orders,[9] rulings of the courts,[10] and opinions of the Attorneys General.[11]

The offenses charged here [12] are unquestionably within the jurisdiction of military commissions.[13] The prisoners are charged with violating Articles of War 81 and 82 (10 U. S. C. §§ 1553–4) which specifically provide for trial by military commission. They are also charged with violating the common law of war in crossing our military lines and appearing behind our lines in civilian dress, with hostile purpose, and with conspiring to commit all the above violations, which in itself constitutes an additional violation of the laws of war. The jurisdiction of military commissions

[9] Proclamation of Pres. Lincoln, Sept. 24, 1862.

[10] *Ex parte Vallandigham*, 1 Wall. 243 (1863).

[11] 11 Ops. A. G. 297 (1865); 13 Id. 59 (1869); 14 Id. 249 (1873).

[12] An analysis of the charges and specifications appears in Appendix III of this brief.

[13] "Whenever a civilian citizen or alien is engaged in practices which directly interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result, and when, therefore, these practices are something more than mere seditious or traitorous designs or attempts against the existing civil government, the President as Commander

over these offenses under the law of war (in addition to the specific offenses codified in the Articles of War) is expressly recognized by Article of War 15 (10 U. S. C. § 1486).

It may be true that the hostile actions of these prisoners might authorize a prosecution for treason or espionage or sabotage under criminal statutes in *civil* courts. That fact does not, however, cast any doubt upon the congressional confirmation of the traditional jurisdiction of military tribunals to try such prisoners for offenses against the laws of war.[14] Where hostile conduct of the present type is involved, the military commission cannot be deprived of its jurisdiction merely because of the possibility of different, slower, and less certain punishment in the civil courts. This is the clear ruling of *Ex parte Mason,* 105 U. S. 696 (1881); *Grafton* v. *United States,* 206 U. S. 333 (1907); and *Ex parte Dunn,* 250 Fed. 871 (D. Mass. 1918). See also *United States* v. *McDonald,* 265 Fed. 754 (S. D. N. Y., 1920), *app. dismissed,* 256 U. S. 705 (1921).

---

in Chief may treat this person as an enemy, and cause him to be arrested, tried, and punished in a military manner, although the civil courts are open, and although his offence may be sedition or treason, or perhaps may not be recognized as a crime by the civil code." (Pomeroy, *Constitutional Law* (10th ed. 1888) 597.)

[14] The Espionage Act of 1917 (50 U. S. C. § 38) expressly preserves the jurisdiction of military commissions under the Articles of War.

III

THE MILITARY COMMISSION HAS JURISDICTION OVER THE PERSONS OF THESE PRISONERS

Enemies and agents of the enemy who cross our battle lines for the purpose of committing espionage, sabotage, and other hostile acts may be tried by military commission without impairment of any of the safeguards of civil liberties contained in the United States Constitution.

The framers of the Constitution never intended that the protective mantle of the clauses guaranteeing "due process," "jury trial," and other such rights, should be used to cloak enemy violators of the law of war who seek to destroy the state from which they seek those "rights." The Fifth Amendment makes this clear in the following provision:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *

The clause in this provision which excepts "cases arising in the land or naval forces" has always been regarded as a limitation on all the other clauses of the Bill of Rights. Even the majority and the minority judges in *Ex parte Milligan,* 4

Wall. 2, 123, 138–9 (1866)[15] were able to agree on this. By clear negative inference—never doubted and fortified by over a century of practice—such "cases" can be tried by summary military process, without "presentment or indictment of a Grand Jury."

Our own soldiers and sailors have no rights under the Fifth Amendment. It would be ridiculous to recognize such rights for the armed forces of the enemy.[16]

The offenses charged here arise in the land or naval forces. These prisoners are charged (1) with violating the law of war, by secretly passing through our military and naval lines for the purposes of committing various war crimes and (2) with violating Articles 81 and 82 of the Articles of War (10 U. S. C. §§ 1553–4).

The law of war which prohibits spying and other war crimes behind the lines is not confined to any particular class of person. Citizen and noncitizen, military and nonmilitary, are equally condemned. So also the Articles of War: Citizens as

---

[15] *Ex Parte Milligan* is discussed at length at pp. 41–48, *infra*.

[16] Hamilton wrote in The Federalist (Dawson Ed. 1863) 587:

"I feel a deep and deliberate conviction that there are many cases in which trial by jury is an ineligible one. I think it is so particularly in cases which concern the public peace with foreign nations; that is, in most case where the question turns wholly on the Laws of Nations."

well as aliens (enemy or not) and civilians as well as soldiers are all within their scope. The Eighty-first Article uses the word "whosoever" and the Eighty-second extends to "any person," in specific statutory language. Indeed it was for the very purpose of trying *civilians* for war crimes that military commissions first came into use. Winthrop, *Military Law and Precedents* (1920) 831–841.

This broad comprehension of persons is well within the limits of the excepting clause of the Fifth Amendment. That clause reads "*cases* arising in the land or naval forces" and not *members* of the land or naval forces. It has been almost universally construed to include civilians. Wiener, *A Practical Manual of Martial Law* (1940), 137; Morgan, *Court-Martial Jurisdiction over Nonmilitary Persons under the Articles of War* (1920), 4 Minn. L. Rev. 79, 107; Winthrop, *Military Law and Precedents* (1920 ed.) 48, 767; Fletcher, *The Civilian and the War Power* (1918), 2 Minn. L. Rev. 110, 126; 16 Op. Atty. Gen. 292 (1879); *Ex parte Wildman,* 29 Fed. Cases 1232 (1876 D. C. Kan.). Such construction is founded in common sense: of all hostile acts, those by civilians are most dangerous and should be punished most severely.

The remaining question is the *territorial* extension of the common law of war and of Articles 81 and 82 to offenses such as are here charged.

By the law of war, war crimes can be committed anywhere "within the lines of a belligerent." Oppenheim's *International Law* (Lauterpacht's 6th ed. 1940) 457. Article 82 adds the all-inclusive phrase "or elsewhere" to its specification of "fortifications, posts, quarters, or encampments of any of the armies of the United States." Article 81 states no territorial limitations.

The full extent of the jurisdiction of military commissions to try civilians for offenses against the law of war need not now be decided. However narrow may be the territorial limits in which the law of war can be made to apply, there can be no question but that it applies to enemies who come through our lines for the purpose of committing war offenses behind our lines. Having violated the law of war in an area where it obviously applies, they are subject to trial by military tribunals wherever they may be apprehended. It is generally conceded that Congress may grant jurisdiction to try civilians for offenses which "occur in the theatre of war, in the theatre of operations, or in any place over which the military forces have actual control and jurisdiction." Morgan, *supra*, at 107; Wiener, *supra*, at 137.

Neither the Bill of Rights nor *Ex Parte Milligan*, 4 Wall. 2 (1866), grants to such persons constitutional guarantees which the Fifth Amendment expressly denies to our own soldiers. Such privileges are not for the benefit of the enemy's forces.

Civil process is not the privilege of prisoners of war. Still less is it the privilege of invading war offenders not entitled to the rights of prisoners of war.

No drastic revision of conventional concepts is needed here: These prisoners were in fact and purpose invaders without uniform and they brought with them the instruments of the destruction they intended. They were caught by fresh pursuit *in flagrante delicto.*

Constitutional protections which might be invoked to secure civil trial for United States residents who have not, during the war, left this country, and who have not become the secret agents of its enemies, cannot be construed to make the nation impotent against so bold and dangerous an attack.

IV

THE DECISION IN *EX PARTE MILLIGAN* HAS NO APPLICATION HERE

The prisoners rely on *Ex Parte Milligan*, 4 Wall. 2 (1866).

The actual decision in the *Milligan* case was an interpretation and application of a Congressional statute which had a limited life and long ago ceased to be controlling.

To facilitate the prosecution of the Civil War, Congress had exercised its constitutional power to suspend the privilege of the writ of habeas corpus. In the act suspending the privilege of the

writ (March 3, 1863, ch. 81; 12 Stat. 755), it was provided that the names of detained citizens, *other than prisoners of war,* should be filed with the courts at the places of their residence. If, thereafter, a grand jury should sit and fail to indict, the detained citizen should be discharged on order of the court. It was this legislation alone that required the decision rendered in the *Milligan* case.

Milligan was arrested by the military in Indiana, tried there before a military commission appointed by the military commander of the district of Indiana, and found guilty of conspiring against the United States, aiding rebels, inciting insurrection, engaging in disloyal practices, and violating the laws of war. He was sentenced to death, and the sentence was approved by the President.

More than sixty days after Milligan's arrest, the United States Circuit Court and the grand jury attendant upon it met in Indianapolis. The grand jury terminated its session without indicting Milligan. Thereupon, invoking the Act of March 3, 1863, Milligan, by a petition under the Act, which the Court treated as a habeas corpus petition, sought "to be delivered from military custody and imprisonment, and if found probably guilty of any offence, to be turned over to the proper tribunal for inquiry and punishment; or, if not found thus probably guilty, to be discharged altogether" (4 Wall. 135). The case came before the Supreme

Court upon a certificate of division from the judges of the Circuit Court for Indiana.

The point decided by the Supreme Court was that the effective congressional legislation then forbade a military trial of a civilian resident. The nine justices of the Supreme Court were unanimous upon this point. Mr. Chief Justice Chase said, at page 141:

> That body [Congress] did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them.

If legislation prohibited a military trial, it was superfluous to consider whether legislation permitting it would have been constitutional. However, Mr. Justice Davis, speaking for five members of the Court, went on to state that if a statute *were* passed permitting trial of civilian residents by military commission, that statute would be unconstitutional.

He reasoned that the law of war was subject to the Constitution, that under the Fifth and Sixth Amendments no resident civilian citizen could ever be held for military trial and punishment so long as the courts were open, that the courts could never legally be closed except where martial law had been declared, based on an actual invasion rendering the courts incapable of performing their duties, and that Indiana had not been invaded in this sense.

Chief Justice Chase, on behalf of the four remaining justices, took vigorous exception to this position. He said:

> We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment. * * * And is it impossible to imagine cases in which citizens conspiring or attempting the destruction or great injury of the national forces may be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power? (p. 138–9).
>
> * * * * *
>
> [Congress] has, therefore, the power to provide by law for carrying on the war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of compaigns. That power and duty belong to the President as commander in chief (p. 139).
>
> * * * * *
>
> We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exer-

> cising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators (p. 140–1).

Even the majority dictum in the *Milligan* case is distinguishable on the facts.

Milligan was a civilian; the present defendants are imprisoned combatants of an enemy nation. Milligan had been resident twenty years in the state of his domicile, he was "arrested while at his home" (4 Wall., at p. 118); the petitioners are belligerent enemies who were brought to this country in enemy war vessels and broke through our lines of defense. The majority in the *Milligan* case emphasized that Milligan was "not a resident of one of the rebellious states, or a prisoner of war" (4 Wall., at p. 118). These prisoners are residents of the enemy country, and are military captives of a type not even entitled to the treatment accorded to prisoners of war.

The *Milligan* case was decided in time of peace, after the problems of war were over. Bitterly received at the time it was first announced, the majority dictum in *Ex Parte Milligan* has been subjected to severe criticism. 2 Warren, *The Supreme Court in United States History* (1937) 418;

Corwin, *The President: Office and Powers* (2d ed. 1941) 165."

The time may now have come when the exigencies of a total and a global war must force a recognition that every foot of this country is within the "theatre of operations". Under modern conditions warfare by saboteurs and spies imperils the national safety just as much as warfare by tanks and submarines.

One District Court has been willing completely to revise the concept of "theatre of operations." In *United States v. McDonald*, 265 Fed. 754 (S. D. N. Y., 1920, appeal dismissed on stipulation, 256 U. S. 705 (1921), the court held that a German spy who was operating about the port of New York was sufficiently within the theatre of war to justify trial by naval court martial. The court said:

> Military authorities should have power to try spies wherever found; otherwise they may not be subject to trial for that offense. * * * The term "theatre of war," as used in the Milligan Case, apparently was intended to mean the territory of activity of conflict. With the progress made in ob-

---

[17] Professor Burgess expresses the view that the dicta in the majority opinion could never stand "the strain of actual war." 1 Burgess, *Political Science and Comparative Constitutional Law* (1900) 248-252. And, certainly, "the doctrine of the majority in *Ex Parte Milligan* does not go far enough to meet the conditions of modern war." Fairman, *The Law of Martial Rule and the National Emergency* (1942), 55 Harv. L. Rev. 1254.

taining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. * * *

One of the lessons taught by this war is that the ocean is no longer a barrier for safety or an insurance against America's being involved in European wars. She cannot now become an asylum of safety for spies * * * (265 Fed. at 763–764).

Congress has prescribed that certain enemies and enemy agents charged with violating the laws of war in certain specific ways shall be tried by the most appropriate tribunal, a military commission. Accepting this Congressional mandate, the President has nominated a particular commission to try particular war offenders.

One does not have to argue that either the President or Congress, or both, can place *all* citizens *everywhere* under martial law to justify such limited and traditional procedure for securing the national safety. The test of whether or not the civil courts are open to punish civil crimes is too unrealistic a test to be applied blindly to all exercises of military jurisdiction.

"The necessity for martial rule arises," as Fairman writes,[18] "rather from the proximity of a danger than from the fact that the courts are closed." The "proximity of danger" may obviously be such as to require military jurisdiction of some war

[18] *Martial Rule* (1930) 147

offenders without necessarily requiring it for all citizens. How absurd it would be to suggest that the President as Commander-in-Chief must close all courts in order to secure the well-recognized right to mete out the traditional retribution of quick and certain military punishment to spies and other war offenders who succeed in invading our boundaries.[19]

V

THE JUDGMENT OF THE PRESIDENT AS TO WHAT CONSTITUTES NECESSITY FOR TRIAL BY MILITARY TRIBUNAL SHOULD NOT LIGHTLY BE DISREGARDED

Much wiser precedent for the conduct of war than *Ex parte Milligan* can be found in the *Prize Cases,* 2 Black 635 (1863), wherein Mr. Justice Grier said on behalf of the Supreme Court:

> If a war be made by invasion of a foreign nation, the President is not only authorized,

[19] Nor can any doubts about the validity of a military trial of these prisoners be found in the much-discussed case of *Pablo Waberski*, 31 Ops. A. G. 356 (1918). There the Attorney General several times emphasized—what he erroneously assumed to be fact—that Waberski "had not come through the fighting lines or field of military operations." Later when it was discovered that Waberski had come through such lines (from Mexico) and had "lurked" about military fortifications, a successor Attorney General issued a new opinion, as yet unpublished, that Waberski was subject to trial by military tribunal. Wiener, *supra*, at 140. The new opinion is printed in Appendix V to this brief.

but bound to resist force by force. (2 Black, at 668.)

In holding that the President had power to proclaim a blockade against United States citizens who were residents of the Southern states and, hence, to make lawful what would otherwise have been unlawful, to wit: the seizure of the property of such citizens on the high seas as enemy property, the Court announced:

> Whether the President in fulfilling his duties, as Commander-in-Chief, in suppressing an insurrection, has met with such hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." (2 Black, at 670.)

The English courts have not only long since rejected the doctrine of *Ex parte Milligan,* which they once accepted,[20] but also have recently sustained a wide discretion granted to the Executive for the detention of persons suspected of hostile associations. *Liversidge* v. *Anderson* [1942], 1 A. C. 206 (1941); *Greene* v. *Secretary of State for Home Affairs* [1942], 1 A. C. 284 (1941). In both

[20]Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 Harv. L. Rev. 1253, 1256.

cases, the House of Lords declined to inquire into the grounds for the Home Secretary's belief that it was "reasonable" to detain the prisoner. These decisions do not seem to have destroyed democracy in England. Carr, *A Regulated Liberty* (1942), 42 Col. L. Rev. 339.

In *Liversidge* v. *Anderson,* cited above, Liversidge, apparently a British subject, was incarcerated under the Defense (General) Regulations (1939), reg. 18B, par. 1, and brought a civil suit for damages. He filed a demand for a bill of the particulars of the causes of his detention, and the response to the demand was to the effect that the Home Secretary had reasonable cause to believe that Liversidge was a person "of hostile origin or associations", in the words of Regulation 18B, and that his detention was necessary to insure the public safety. The House of Lords, upon appeal, declined either to inquire into the sufficiency of the causes of detention or to require the disclosure demanded. The mere statement of the Home Secretary that he had "reasonable cause" to believe that the detention of Liversidge was necessary to the public safety was regarded as sufficient. In so deciding, the Court said:

> The purpose of the regulation is to ensure the public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm (p. 251–2).

* * * * *

> Even a judge may be allowed to take notice of the import of words like Fifth Columnists and Quislings and the like. It is the duty of the Secretary to check these underground and insidious activities of the enemy and their consequences, whether they result in sabotage or anti-British propaganda or in weakening the national effort and endurance (p. 265).

In *Greene* v. *Secretary for Home Affairs* [1942], 1 A. C. 284 (1941), the court reached the identical result on a petition for habeas corpus by Greene, a British subject.

Under our laws, too, the courts do not inquire into the Executive's determination on matters of the type here involved. The President's determination under the Act of 1795 of the "necessity" for calling out the militia was held conclusive in *Martin v. Mott*, 12 Wheat, 19 (1827). Cf. *United States* v. *George S. Bush & Co.*, 310 U. S. 371 (1940); *United States* v. *Curtiss-Wright Export Corporation*, 299 U. S. 304, 320 (1936); *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163 (1919).

Even if it be assumed that the President's nomination of a military commission to try war criminals, as specified by Congress, must be tested by the "actual and present necessity" criterion of the majority opinion in the *Milligan* Case, this court will not review the President's judgment save in a case of grave and obvious abuse. Speaking for the Court in *Moyer* v. *Peabody*, 212 U. S.

78 (1909), which refused to inquire into the "necessity" for a declaration of martial law by the Governor of Colorado, Mr. Justice Holmes said:

> When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. (212 U. S., at 85.)

Likewise, in *Sterling* v. *Constantin*, 287 U. S. 378 (1932), though the Court did inquire into the "necessity" for a declaration by the Governor of Texas, Chief Justice Hughes said:

> The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. (287 U. S., at 399–400.)

If so much discretion is allowed to the Governor of a State in policing industrial disputes, how much more should be allowed to the President in repelling foreign invasion.

To test the exercise of his discretion by the existence of the "visible disorder" mentioned in the *Milligan* case is no test at all where war is being waged by spies and saboteurs.

VI

THERE ARE NO TECHNICAL DEFECTS IN THE CREATION OF THE COMMISSION OR IN ITS ACTIONS

Petitioners' objections on this score are of three types:

A. That the Commission was improperly convened and constituted.

B. That the procedure and regulations prescribed for it by the President are unlawful.

C. That some of its actions have been illegal.

A. *The Commission was legally convened and constituted.*

Under Articles of War 8, 15 and 38 (10 U. S. C. §§ 1479, 1486, 1509), the President is authorized to appoint military commissions in respect of offenders or offenses that by statute or by the law of war are triable by such military commissions. Pursuant to the authority thus granted, he appointed this Military Commission by a precept dated July 2, 1942 (Exhibit A attached to the petitions).

The legality of the appointment of the members of this Military Commission has not been questioned. But the petitioners raise questions respecting the qualifications of the Attorney

General of the United States and of the Judge Advocate General to act as prosecutors, on the ground that their duties as prosecutors are inconsistent with other functions they are or may be required to perform in this case.

While no such conflicts of interest actually exist, it is not necessary even to inquire whether the Attorney General and the Judge Advocate General have inconsistent duties to perform. Military courts form no part of the judicial branch of the government. *Kurtz* v. *Moffitt,* 115 U. S. 487, 500 (1885). The judiciary will not examine into alleged conflicts of interest on the part of officers of military courts. *Keyes* v. *United States,* 109 U. S. 336 (1883) (in which officer acted as judge, prosecutor and witness).

B. *The Procedure and Regulations prescribed by the President are proper.*

Article 38 of the Articles of War (10 U. S. C. § 1509) provides that:

> The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions and other military tribunals, which regulations shall in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed * * *

The regulations established in the President's Order of July 2d are:

> The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the Members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

Petitioners challenge the regulations prescribed by the President as being "contrary to" or "inconsistent with" Articles of War 38, 43, 46, 50½, and 70 (10 U. S. C. §§ 1509, 1514, 1517, 1522, 1542).

The Articles of War (10 U. S. C. §§ 1471–1593a) refer at various places to many sorts of military tribunals, including courts-martial, military commissions, provost courts and courts of inquiry. However, the Articles deal primarily with courts-martial, their procedure, and the offenses cognizable therein.

Chapter II of the Articles of War, entitled "Courts Martial," includes Articles 3 through 53. These articles refer solely to courts-martial, their

constitution and procedure, except for certain articles expressly mentioning military commissions.

Article 38, as above quoted, gives the President power to prescribe additional rules of procedure for courts-martial. In conferring this rule-making power upon the President, Congress in the same sentence gave him the power to promulgate rules for *military commissions.* It then provided "That nothing contrary to or inconsistent with these articles shall be so prescribed." To the extent that the Article is applicable to the prescribing of rules for *military commissions,* Congress clearly was referring in the proviso only to those "articles" which expressly mention military commissions.

None of the procedural articles relied on by petitioners (except Article 38, considered below) expressly refers to military commissions. None of them is applicable here.

Petitioners' objections and the conclusive answers thereto follow:

1. The President's Order authorizes conviction by two-thirds vote, instead of by unanimous vote (Article of War 43).

Article of War 43, requiring unanimity for a death sentence, starts out by saying "No person shall, *by general court martial* [be sentenced to death by less than] all the members of said *court martial* present at the time * * *" [Italics added.]

2. No formal investigation of the charges was made at which the prisoners were given the right to cross-examine witnesses and present evidence (Article of War 70).

Article of War 70 provides in its second paragraph that no charge is to be referred to *a general court martial* for trial until a thorough and impartial investigation has been made. The legislative history of this section clearly indicates that it is confined to cases in which the charges were to be referred to a general court martial. It has no application to charges referred to a military commission. Prior to its amendment in 1937, the paragraph began with this sentence (41 Stat. 802):

> No charge *will be referred for trial* until after a thorough and impartial investigation thereof shall have been made. [Italics added.]

Since the amendment (50 Stat. 724), it reads:

> No charge *will be referred to a general court martial* for trial until after a thorough and impartial investigation thereof shall have been made. [Italics added.]

3. The President's Order is said to make improper provision for review (Articles of War 46, 50½).

Article 46 provides merely that "under such regulations as may be prescribed by the President," every record of trial by court martial or military commission which is received by "a reviewing or confirming authority" shall be referred by that

reviewing authority, before he acts thereon, to his staff judge advocate or to the Judge Advocate General.

It may be conceded that the President is a "reviewing or confirming authority." But he is also the President, with the power to prescribe the regulations under which references to judge advocate officers shall be made. In the present case, with his own Judge Advocate General acting by Presidential command as a prosecutor, it was particularly appropriate for the President to prescribe that the record be referred directly to the President for action. The President, as the supreme military authority, has the power to substitute his own review for review by his subordinate officers. No right of the prisoners could possibly be injured thereby.

Article 50½ prescribes the manner in which records *in certain types of cases* must be reviewed by a board of review established by the Judge Advocate General. But the present case is not included within those to which Article 50½ applies. Article 50½ applies only—

(a) to cases in which a *court martial* has imposed certain types of sentences; and

(b) to cases in which the President's approval of a sentence is *required* under Articles 46, 48 or 51.

Article 46 does not *require* review of any sentence imposed by a military commission. Article 48 refers only to courts martial. Article 51 applies only to cases where a sentence is suspended in the

discretion of an inferior officer in order to request review by the President.

It is further to be observed that the limitations argued in connection with Articles 46, 48 and 50½ are, for the purposes of these petitioners rendered practically without effect by the provision contained in Article 48 that where the authority (in this case, the President) competent to confirm the sentence has already acted as the approving authority (again, in this case, the President, as the appointing officer) no additional confirmation by him is necessary. And when no additional confirmation is necessary, review through a board of review is not required.

4. Petitioners' final objection to the procedure and regulations prescribed by the President is based on the clause in the precept of July 2, stating that the Commission "shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."

This was not a complete delegation of rule-making power to the Commission, since the Order goes on to prescribe specific rules governing the admission of evidence, the vote necessary for sentence, and review. But even if it was, the petitioners were in no way harmed thereby. Practically every court in the land has the power to make its own rules for

the conduct of its proceedings. Military commissions are not more circumscribed, when they are authorized to prescribe rules by the President.

The doctrine of unconstitutional delegation of powers has no application here. That doctrine relates only to the improper transfer of powers from one of the three branches of the government to another. It has nothing to do with delegations by the Chief Executive to his military subordinates within the executive branch. Military courts "form no part of the judicial system of the United States." *Kurtz* v. *Moffitt*, 115 U. S. 487, 500 (1885).

C. *The Commission's actions have been lawful.*— Petitioners attack the actions of the Commission on a variety of grounds, ranging from its refusal to permit peremptory challenges[21] to its rulings on the admissibility and sufficiency of evidence.

None of these omnibus objections are cognizable by this Court. The writ of habeas corpus can only be used to question the jurisdiction of a military tribunal. It cannot be converted into a device for civil court review of nonjurisdictional error. *Ex parte Reed*, 100 U. S. 13 (1879); *Collins* v. *McDonald*, 258 U. S. 416 (1922); *Carter* v. *Roberts*, 177 U. S. 496 (1900); *Swaim* v. *United States*, 165 U. S. 553 (1897); *Johnson* v. *Sayre*, 158 U. S. 109 (1895); *United States* v. *Fletcher*, 148 U. S. 84 (1893); *Dynes* v. *Hoover*, 20 How. 65 (1858).

[21] Article of War 18, on which petitioners rely, permits peremptory challenge to each side in a trial by court-martial. It does not refer to military commissions.

In *Collins* v. *McDonald*, 258 U. S. 416 (1922), application for a writ of habeas corpus had been made by one who had been convicted by a court-martial. On appeal, the Supreme Court ruled that the petitioner was not entitled to the writ.

At page 418 the Court said:

> Thus, the question for decision here is, Does the petition show want of jurisdiction in the court martial over the person of the accused and over the offense with which he was charged and for which he was sentenced?

The Court found that the court martial had jurisdiction over both the person and the offense. It then considered the petitioner's contention that there had been insufficient and improperly admitted evidence. With respect to this, the Court said at page 420:

> It is also charged that there was no evidence of guilt before the court-martial other than the confession of the accused, which, it is averred, was made, under oath, to and at the instance of his superior officer, under duress, whereby it is alleged he was compelled to become a witness against himself in violation of the Constitution of the United States. This, in substance, is a conclusion of the pleader, unsupported by any reference to the record and, at most, was an error in the admission of testimony, which cannot be reviewed in a *habeas corpus* proceeding.

The opinion in the *Collins* case—backed by all of the decisions cited above—is conclusive on all of

petitioner's objections to the admissibility and sufficiency of the evidence.

CONCLUSION

The United States and Nazi Germany are fighting a war to determine which of the two shall survive. This case is no more than a small skirmish, but on an important front. It is part of the business of war.

Military trial for the petitioners endangers no traditional civil liberty. These German soldiers have already been given rights which no American would receive in Germany, and now ask for "constitutional" privileges which we do not allow our own soldiers. Their applications for writs of habeas corpus should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Attorney General,
Maj. Gen. MYRON C. CRAMER, U. S. A.,
The Judge Advocate General,
Attorneys for the Respondent.

OSCAR COX,
Assistant Solicitor General,
Col. ERWIN M. TREUSCH, U. S. A.,
GEORGE THOMAS WASHINGTON,
ROBERT S. STEVENS,
MYRES S. MCDOUGAL,
LLOYD N. CUTLER,
Of Counsel.

JULY 29, 1942.

APPENDIX I

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

CONSTITUTION

Article I, Section 8:

The Congress shall have Power * * *

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

* * * * *

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 1:

* * * * *

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or

affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States."

Article II, Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.

Article III, Section 2:

* * * * *

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and pub-

lic trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

TREATIES

ANNEX TO THE HAGUE CONVENTION. 36 STAT. 2295 (1907, 1910)

Regulations respecting the laws and customs of war on land.

SECTION I.—ON BELLIGERENTS

CHAPTER I.—*The qualifications of belligerents*

Article 1:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:—

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctiye emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Article 29:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

STATUTES

THE ARTICLES OF WAR

(Title 10 U. S. C. § 1471–1593a)

Article 15 (§ 1486):

The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 790.)

Article 18 (§ 1489):

Members of a general or special court-martial may be challenged by the accused or the trial judge advocate for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time. Challenges by the trial judge advocate shall ordinarily be presented and decided before those by the accused are offered. Each side shall be

entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 790.)

Article 38 (§ 1509):

The President may, by regulations, which he may modify from time to time, prescrib the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided,* That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further,* That all rules made in pursuance of this article shall be laid before the Congress annually. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 794.)

Article 43 (§ 1514):

No person shall by, general court-martial, be convicted of an offense for which the death penalty is made mandatory by law, nor sentenced to suffer death, except by the concurrence of all the members of said court-martial present at the time the vote is taken, and for an offense in these articles expressly made punishable by death; nor sentenced to life imprisonment, nor to confinement for more than ten years, except by the concurrence of three-fourths of all of the members present at the time the vote is taken. All other convictions and sentences, whether by general or special court-martial, may be determined by a two-thirds vote of those members present at the time the vote is taken. All other questions shall be de-

termined by a majority vote. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 795.)

Article 46 (§ 1517):

Under such regulations as may be prescribed by the President every record of trial by general court-martial or military commission received by a reviewing or confirming authority shall be referred by him, before he acts thereon, to his staff judge advocate or to the Judge Advocate General. No sentence of a court-martial shall be carried into execution until the same shall have been approved by the officer appointing the court or by the officer commanding for the time being. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 796.)

Article 50½ (§ 1522): Article 50½ is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1522.

Article 70. (§ 1542): Article 70 is too long to justify quotation herein. It may be found at Title 50 U. S. C. § 1542.

Article 81 (§ 1553):

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct. (June 4, 1920, ch. 227, subch. II § 1, 41 Stat. 804.)

Article 82 (§ 1554):

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or

encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death. (June 4, 1920, ch. 227, subch. II, § 1, 41 Stat. 804.)

ACT OF JULY 6, 1798, C. 66, SEC. 2, 1 STAT. 577

(Title 50, U. S. C., sec. 21)

The text of this section appears at page 20 of this brief.

TRADING WITH THE ENEMY ACT OF 1917

(Title 50, U. S. C., Appendix, sec. 1, *et seq.*)

Sec. 2. (a) Any individual, partnership, or other body of individuals of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. * * *

* * * * * * *

Sec. 7. (b) * * * Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in section ten hereof (section 10 of this appendix): *Provided, however,* That an enemy or

ally of enemy licensed to do business under this act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such license and so long as such license remains in full force and effect: *And provided further,* That an enemy or ally of enemy may defend by counsel any suit in equity or action at law which may be brought against him. * * *

NATIONALITY ACT OF 1940

(Title 8, U. S. C., sec. 801)

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: * * *

* * * * *

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic of consular officer of the

United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval service of the United States in time of war, provided he is convicted thereof by a court martial; or

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction. (Oct. 14, 1940, c. 876, title I, Subch. IV, sec. 401, 54 Stat. 1168.)

APPENDIX II

MILITARY TRIALS OF UNLAWFUL BELLIGERENTS: A HISTORICAL SURVEY

From the inception of our national history, it has been American practice, in time of war, to try unlawful belligerents before military tribunals. Some of the more notable instances of such trials are listed below.

I. THE REVOLUTIONARY WAR

On September 21, 1776, Captain Nathan Hale of the Continental Army was apprehended behind the British lines on Long Island dressed in civilian clothes and bearing information concerning the British fortifications. Charged as a spy before a military court, he was found guilty and hung within twenty-four hours.

In May, 1777, John Brown, a civilian, was convicted by an American general court martial of corresponding with the enemy. 3 Journals of Congress 407.

In 1780 Major André of the British Army, apprehended behind the American lines wearing civilian clothes and bearing information concerning the defenses of the fort at West Point, was convicted as a spy by a military court of inquiry.

In the same year a civilian named Joshua Hett Smith was tried by court martial, under resolution of Congress, for assisting and conspiring with Benedict Arnold in his acts of treason.

II. THE WAR OF 1812

Andrew Jackson frequently convened courts martial during the War of 1812, while he was in command of the American forces at New Orleans. Among the most well known of these instances were the cases of R. C. Ambrister and A. Arbuthnot, civilians, who were found guilty of inciting and aiding the Creek Indians to make war against the United States. American State Papers, Military Affairs, vol. I, pp. 721–734.

III. THE MEXICAN WAR

On February 19, 1847, General Scott announced that certain acts committed by civilians or military persons in Mexico would be tried before two new types of military courts, the "military commission" and the "council of war." The following General Orders were issued by General Scott, convening these tribunals: Nos. 81, 83, 121, 124, 147, 171, 194, 215, 239, 267, 270, 273, 292, 334, 335, 380, 392 (1847); No. 9 (1848). General Taylor issued the following General Orders for the same purpose: Nos. 66, 106, 112, 121 (1847); and General Wool issued Orders 140, 179, 216, 463, 476, 514 (1847).

IV. THE CIVIL WAR

During the Civil War the military commission and the council of war, as used by General Scott, were united into what has been known ever since as the "military commission."

The most notable use of the military commission arising out of the Civil War was the trial

of Mary Surratt, David E. Herold, Lewis Payne, George A. Atzerodt, Edward Spangler, Samuel A. Mudd, Samuel Arnold, and Michael O'Laughlin, for conspiracy in the assassination of Abraham Lincoln. *The Assassination of President Lincoln and the Trial of the Conspirators* (1865).

In 1865, G. St. Leger Grenfel and several associates were convicted of attempting to release confederate prisoners of war at Camp Douglass, near Chicago, and to lay waste and destroy the city of Chicago. G. O. 30, Northern Dept. (1865).

In September and December, 1864, John Y. Beall and certain others seized and destroyed steamers and their cargoes on Lake Erie and attempted to derail trains in New York State. Beall was thereafter sentenced to death by a military commission. G. O. 14, Dept. of the East (1865).)

Robert C. Kennedy was sentenced to death by a military commission in 1865 for having attempted to destroy New York City by setting fire to Barnum's Museum and ten hotels on the night of November 25, 1864. (G. O. 24, Dept. of the East (1865).)

Also sentenced to death by military commission for the seizure or destruction of steamboats, buildings, railroad facilities, telegraph lines and the like were Robert Louden (G. O. 41 of 1864) and William Murphy (G. C. M. O. 107 of 1866).

T. E. Hogg and six associates were convicted by a military commission in 1865 for trying to seize a United States merchant ship and its cargo on behalf of the Confederacy. (G. O. 52, Dept. of the Pacific (1865).)

Clement L. Vallandigham, a congressman from Ohio and head of the Sons of Liberty, was convicted by a military commission in 1863 for publicly expressing sympathy with the Confederacy. Vallandigham's appeal to the Supreme Court was denied. 1 Wall. 243 (1864).

Lambdin P. Milligan was convicted by military commission of conspiring against the United States Government, and was later released by writ of habeas corpus. 4 Wall. 2 (1866).

The General Orders issued during the Civil War contain nearly 150 cases of women tried by military commissions. During that War military commissions were employed in several thousand cases.

The principle offenses punished were:

> Unauthorized trading or commercial intercourse with the enemy; unauthorized correspondence with the enemy; blockade-running; mail-carrying across the lines; drawing a bill of exchange upon an enemy, or by an enemy upon a party in a northern city; dealing in, negotiation, or uttering Confederate securities or money; manufacturing arms, etc., for the enemy; furnishing to an enemy articles contraband of war; dealing in such articles in violation of military orders; publicly expressing hostility to the U. S. Government or sympathy with the enemy; coming within the lines of the army from the enemy without authority; violating a flag of truce; violation of an oath of allegiance, or of an amnesty oath; violation of parole by a prisoner of war; aiding prisoner of war to escape; unwarranted treatment of Federal prisoners of war; burning, destroying, or obstructing

railroads, bridges, steamboats, etc., used in military operations; cutting telegraph wires between military posts; recruiting for the enemy within the Federal lines; engaging in "guerrilla" or partisan warfare; assisting Federal soldiers to desert; resisting or obstructing an enrollment or draft; impeding enlistments; violating orders in regard to selling liquor to soldiers or other military orders of police in a district under military government; attempt without success to aid the enemy by transporting to him articles contraband of war; conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy. *Digest of Opinions of the Judge Advocate General,* Howland (1912) 1071.

V. POST CIVIL WAR

In 1873 certain members of the Modoc Indian tribe were convicted by military commission for treacherously killing Brigadier General Canby and Rev. E. Thomas during a truce. It is questionable whether the Indians who were engaged in armed warfare may be classified as civilians, but this case is at least authority on the use of a military commission for violation of the laws of war by enemies of the United States. G. C. M. O. 32 and 34 of 1873.

VI. THE WORLD WAR

During the World War no occasion arose for the use of a military commission. Courts martial were, however, used to try German spies caught during 1917–1918. The most famous cases in-

volve a German naval officer named *Wessels,* and one *Pablo Waberski.* The former was convicted by a naval court martial of acting as a spy. *United States* v. *McDonald,* 265 Fed. 754 (S. D. N. Y., 1920), app. dismissed 256 U. S. 705 (1921). The latter was convicted by a military court martial for violating the 82nd Article of War. See Appendix V of this brief.

These cases of military trials of unlawful belligerents will be found discussed in Winthrop, *Military Law and Precedents* (1920); Davis, *Military Law* (1913); and Birkheimer, *Military Government and Martial Law* (1904).

473901A—42——6

APPENDIX III

ANALYSIS OF CHARGES AND SPECIFICATIONS

The charges and specifications preferred against the prisoners are set forth in full as Exhibit E to each of the petitions.

They are summarized below, with a statement of the applicable rules of law.

Charge I—Specification 1.—The gravamen of the specification is that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, a foreign state with which the United States is at war, for the purpose of sabotaging one or more war industries or one or more war utilities or war materials within the United States, secretly passed through coastal military or naval lines or defenses of the United States and, in civilian dress, went within zones of military operations or elsewhere behind one or more of those lines or defenses.

(*a*) The Rules of Land Warfare specifically denounce such conduct as contrary to the laws of war. *Rules of Land Warfare* (1940), secs. 348, 351, 352. Section 351 reads as follows:

"Men and bodies of men, who, without being lawful belligerents as defined in paragraph 9, nevertheless commit hostile acts of any kind, are not entitled to the privileges of combatants. If captured, they have no right to be treated as prisoners of war. They may not, however, after being

captured, be summarily put to death or otherwise punished, but may be brought to trial before a military commission or other tribunal, which may sentence them to death or such other punishment as it may consider proper."

(*b*) Apart from the Rules of Land Warfare, such conduct has long been recognized as violative of the laws of war.

Instructions for the Government of Armies of the United States in the Field, G. O. 100, A. G. O. 1863, sec. 4, par. 4; sec. 5, pars. 15, 16.

Winthrop, *Military Law and Precedents,* (1920) 383–839.

(*c*) Persons who engage in such conduct are not lawful belligerents; if apprehended within our lines, they are not entitled to be treated as prisoners of war, but are subject to military trial as offenders against the laws of war.

Rules of Land Warfare (1940), sec. 351.

Charge I—Specification 2.—The specification alleges that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, without being in the uniform of the armed forces thereof, for the purpose of sabotaging one or more war industries or one or more war utilities or war materials within the United States, appeared within zones of military operations or elsewhere behind one or more of the military or naval lines or defenses of the United States and there planned or attempted to accomplish the said purpose or there assembled together explosives or money or other supplies with which to accomplish the said purpose.

This specification differs from the first in that it speaks of *appearing behind the lines;* the first specification speaks of *crossing the lines.*

Appearance behind the lines within a zone of military operations and elsewhere for the purposes charged is punishable by a military commission.

Rules of Land Warfare (1940), sec. 351.
Risley, *The Law of War,* 108.
Instructions for the Government of Armies of the United States in the Field, G. O. 100, A. G. O. 1863, sec. 5, par. 16.
United States v. *McDonald,* 265 Fed. 754, 763 ff (S. D. N. Y., 1920), app. dismissed 256 U. S. 705 (1921).

Charge II.—The gravamen of the specification is that, contrary to the 81st Article of War, each of the accused persons (1) relieved or attempted to relieve the enemy either directly or indirectly with arms or ammunition or supplies or money or other thing, or (2) knowingly either directly or indirectly harbored or protected or held correspondence with or gave intelligence to the enemy, *in that* each of the accused persons, acting for and on behalf of the German Reich, without being in the uniform of the armed forces thereof, (a) relieved or attempted to relieve one or more others of the accused persons or the German Reich with explosives or money or other things for sabotaging one or more war industries or one or more transportation facilities or war materials of the United States, or (b) knowingly harbored or protected or communicated with or gave intelligence to one or more other of the accused persons or one or more other of the enemies of the United States.

Article 81 of the Articles of War reads:

> "Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court-martial or military commission may direct." (10 U. S. C. § 1553.)

Charge III.—The specification alleges that, each of the accused persons was found in time of war lurking as a spy or acting as a spy, contrary to the 82nd Article of War, in or about a fortification or a post or quarters or an encampment of an army of the United States or elsewhere, *in that* each of the accused, acting for an on behalf of the German Reich, went, secretly and disguised in civilian clothes, about a fortification or a post or an encampment of an army of the United States, or in one or more zones of military operations or elsewhere, behind one or more of the coastal military or naval lines or defenses of the United States, for the purpose of acquiring intelligence relating to sabotage or to some other hostile act or acts which sabotage or hostile act or acts each intended should be committed by himself or by one or more other of the accused persons and for the purpose of communicating that intelligence to one or more others of the accused or to one or more other of the enemies of the United States or to the German Reich.

Article 82 of the Articles of War reads:

> "Any person who in time of war shall be found lurking or acting as a spy in or about

> any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death." (10 U. S. C. § 1554.)

Winthrop, *Military Law and Precedents* (1920), published by the United States Army, describes the proof necessary on a spying charge as follows on page 767:

> During the recent war [Civil War] the majority of the persons tried and convicted as spies were officers or soldiers of the enemy's army, who, in penetrating our lines, had abandoned their proper uniform for the dress of a civilian; and it was held that such an officer or soldier, discovered thus disguised, was in general to be treated, not as a prisoner of war, but as being *prima facie* a spy. This presumption, however, might—it was ruled—be rebutted by evidence that the party had come within the lines for a comparatively innocent purpose—as to visit his family; or, having been detained within the lines by being separated from his regiment, &c., on a retreat, had changed his dress merely to facilitate a return to the other side. In such a case indeed the clearest proof would properly be required before accepting the defense.
>
> But to be charged with the offense of the spy, it is not essential that the accused be a member of the Army or resident of the country of the enemy: He may be a citizen or even a soldier of the nation or people against whom he offends, and, at the time of his offence, legally within their lines.

> So he may either be an emissary of the enemy or one acting on his own accord.

Petitioners claim there is no evidence to support this charge. The sufficiency of the evidence is, however, a matter for the Military Commission. See Point VI, p. 61, *supra*. In view of the highly confidential nature of the abundant testimony on this subject, that evidence cannot be fully developed in this brief. If requested, respondent will hand up to the Court the supporting extracts from the record before the Commission, or the page references thereto.

Charge IV.—The gravamen of the specification is that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, conspired with one or more of the accused persons or with some other enemy or enemies of the United States or with the German Reich, to commit one or more of the offenses specified in Charges I, II, and III.

> A conspiracy to commit an offense is itself an offense; this principle is a part of the laws of war.
>
> Howland, *Digest of Opinions of Judge Advocate General* (1912) 1071.
>
> Cf. *The Assassination of President Lincoln and the Trial of the Conspirators* (1865) 18, 248, and *passim*.

APPENDIX IV

Citizenship of Burger and Haupt

The alleged American citizenship of Burger and Haupt is irrelevant in determining the issues in this case. Citizens or not, their acts made them enemies of the United States in fact and law. Even if it be assumed that their citizenship is relevant, it may be clearly demonstrated that they have forfeited all claims to American citizenship.

BURGER

Ernest Peter Burger was born in Germany in 1906. He entered the United States with a German passport on an immigration quota visa in 1927. He filed a declaration of intention to become a citizen later in that year. A certificate of citizenship was issued to him in 1933. Four or five months thereafter he returned to Germany with an American passport, and remained there until shortly before the commission of the offenses presently alleged against him.

Burger joined the German Army as a private on August 7, 1941, and at that time took an oath of loyalty to Hitler. By this act, he automatically forfeited his American citizenship under the provisions of U. S. Code, Title 8, Sec. 801 (b) and 801 (c). Sec. 801 (b) provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * *
>
> (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state;

The oath of loyalty to Hitler, the Chancellor and President of the German Reich, and the Commander in Chief of its armed forces, constitutes the clear equivalent of an oath of allegiance to the German Reich.

Burger also lost his American nationality under Sec. 801 (c) by:

> (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state.

There was clearly no law of the United States expressly authorizing Burger's service in the armed forces of Germany, either as a soldier in the Army or as a saboteur and spy employed by the German High Command. Moreover, Burger was born in Germany, and under the repeatedly announced theory of that State, was considered to remain a German national, no matter where else he might claim to have established citizenship through naturalization. Thus under both sections (b) and (c), Burger has lost his citizenship status.

It should be pointed out also that under Sections 2 and 7 of the Act of March 2, 1907, 34 Stat. 1228–9 (former § 17 of U. S. C., title 8), continued in force under the Nationality Act of 1940 (54 Stat. 171, 8 U. S. C. § 809), there is a presumption that Burger has lost his citizenship by the fact of more than two years' residence in his native land. He has taken no steps to rebut this presumption in accordance with the provisions of the statute, but has rather indicated in his every act since returning to Germany, his decision to adhere and pay allegiance to the State of Germany. There can thus be no doubt that he is no longer a citizen of the United States.

HAUPT

Herbert Hans Haupt was born in Germany in 1919 (R. 1615). His father, also of German birth, came to this country in 1923 under an immigration visa (R. 1615). Herbert Haupt entered the United States with his mother in 1925 (R. 1615). His father became a naturalized citizen in 1930 (R. 1964). Under the naturalization law at that time (Act of March 2, 1907, c. 2534, 34 Stat. 1229), this conferred at least a presumption of citizenship upon Herbert Haupt.

Upon attaining his majority, no particular affirmative act by Haupt was needed to confirm his American citizenship. It is evident, however, that as a minor, subject to the control of his parents, he had no genuine opportunity of carrying out his own desires as regards citizenship. Therefore, when Haupt attained his majority, any affirmative acts which clearly and unmistakably

evidenced an intention of acting as a citizen of the State of his birth and of acting in allegiance to that State should be taken as a demonstration of his intention not to accept the citizenship status conferred upon him by his parents. There is clear proof of such acts.

Haupt remained in the United States until June 1941, at which time he went to Mexico. He sought to obtain an American passport for this trip but was not able to obtain one. He went to Mexico, he says, because of personal difficulties and because he wished to obtain work in Mexico or Nicaragua (R. 1966). After staying five or six weeks in Mexico, he attempted to obtain permission to go to Guatemala or Nicaragua, but was not able to obtain such permission. Not having ample funds and not being able to obtain work in Mexico he went to the German Consul in Mexico City for assistance. The consul advised him that he could obtain employment under German auspices in Japan. He thereupon sailed in July or August 1941 from Mexico to Japan, traveling on a Japanese vessel at the expense of the German Government, and carrying a German passport (R. 2021–8). After a short stay in Japan, he was given employment on a German vessel (R. 2028–9). He states that the destination was not revealed to him at the time he started service (R. 1973–4). At sea he transshipped to another German vessel, which ran the blockade and landed at Bordeaux, France, in December 1941. Haupt states that he was not told of the destination of this second vessel until he had been at sea on it for some days (R. 1973–4). Haupt proceeded from Bordeaux to Stettin, Ger-

many. He received the Iron Cross, second class, from the German Government for his service on the vessel, as he had been helpful in aiding it to run the blockade. He also received another decoration from the German Government at about the same time (R. 2031).

He states that he was not allowed to obtain gainful employment in Germany (R. 2037), and that when, sometime in March 1942, he was offered an opportunity to join the sabotage school maintained by Lieutenant Walter Kappe of the German High Command, he accepted the offer (R. 2048–50). He claims that he did so with the intention of coming back to the United States, and that he did not intend to go through with any attempts at sabotage in this country (R. 2066–89).

He stated that while on the submarine he decided to inform the American authorities about the mission of the eight accused and their arrival and whereabouts in this country (R. 2089). He landed on June 17, 1942, and proceeded to Chicago. On June 22, he called at the offices of the Federal Bureau of Investigation in Chicago and explained to them that he had not yet registered for the draft because he had been in Mexico for the past year (R. 2093). He admits that he lied in so stating, and that he did not tell the Bureau that he had been in Japan or Germany (R. 2094, 2125). He states he did not inform the Bureau about the mission of the eight accused at this time because he was nervous and afraid, and wanted to think things over (R. 2064–5). He stated that he intended to inform the Bureau after July 6, 1942, when Dasch and the petitioner Kerling were to meet in Chicago,

but he was apprehended by the Bureau on June 27, 1942 (R. 2066–72). He admits he saw at least six people in Chicago, including his father, mother, uncle, and aunt, all of whom knew he had just returned from Germany aboard a submarine with others, but admits he told none of them of his intention to inform the authorities (R. 2064, 2077, 2095–6, 2138–44).

The petitioner, Burger, testifying on his own behalf before the Military Commission, stated on cross examination that he was told by Lieutenant Walter Kappe of the German High Command, who recruited and supervised the training and departure of the eight accused, that each of the accused was assigned to a German Army unit before his departure (R. 2651–2, 2691–2).

Whatever his private reasons, Haupt did in fact enter a school conducted by the German High Command for the sole purpose of training men to sabotage the war efforts of the United States and her allies, and came over here with the other members of the sabotage group. He did nothing to inform the authorities about them. From this conduct and from the fact that he used a German passport in traveling from Mexico via Japan to Germany, it must be inferred that Haupt elected not to accept the status of American citizenship conferred upon him by his parents, but rather to renew his allegiance to his native land.

Even if it be assumed that Haupt did acquire more than a presumption of citizenship by the naturalization of his parents, he can be considered to have been a German citizen also under the constantly reiterated doctrine of that nation that all

members of the German race owe allegiance to the fatherland. While this in itself does not deprive him of American citizenship, affirmative acts on his part indicating his preference for his other nationality cannot be ignored. In such a situation of double citizenship, it is the general rule that "The child on attaining his majority, if the double claim has not sooner been dissolved, has a right to elect which of the two allegiances he will retain; and this election he is required to make." Moore, *International Law Digest,* 1906, vol. 3, p. 518; see also ibid., pp. 543–551. By his enemy acts since attaining majority, Haupt has shown which citizenship he has chosen to elect.

It is true that U. S. Code, Title 8, Sec. 808, provides that "The loss of nationality under this chapter shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this chapter." (Act 14, 1940, c. 876, Title I, subchap. IV, Sec. 408, 54 Stat. 1171.) It is submitted, however, that this provision applies only to the statutory methods set forth in the chapter containing the Nationality Act of 1940. There are other and nonstatutory ways in which a person may lose his American citizenship. *United States ex rel. Rojak* v. *Marshall,* 34 Fed. (2d) 219 (Dist. Ct. W. D. Pa. 1929); *United States ex rel. Scimeca* v. *Husband,* 6 Fed. (2d) 957 (C. C. A. 2d, 1925). Sec. 808, by its own terms, leaves them untouched.

These are not the only grounds for asserting that Haupt is not a citizen. He, equally with Burger, has lost his citizenship under the provisions of U. S. Code, Title 8, Sec. 801 (c). Although he

did not join the German Army, he has admitted that his status in Germany as a graduate of the sabotage school operated by the German High Command was the same as that of a soldier (R. 1625). Moreover, he was issued a special uniform (R. 1639), and was assigned to a unit in the German Army (R. 2651–2, 2691–2), facts clearly implying his membership in the German armed forces. The phrase "armed forces of a foreign state" could not have been intended to include only the traditional types of military forces. In a total war of destruction such as that in which Germany is now engaged, men such as Haupt constitute one of the most potent and dangerous forms of "armed forces." Surely the statute could not be construed to deprive a man of his citizenship for entering the regular army of another nation, and yet leave his status untouched when he enters into the military service of a foreign state in a capacity even more destructive and barbaric. As pointed out in the case of Burger, Haupt's birth in Germany gave him in German eyes a permanent German nationality. This and his entrance into a sabotage group under German military direction satisfy the requirements of the statute.

APPENDIX V

OPINION OF ATTORNEY GENERAL PALMER, DECEMBER 24, 1919, IN THE CASE OF PABLO WABERSKI

Hon. NEWTON D. BAKER,
The Secretary of War,
Washington, D. C.

SIR: I have the honor to respond to your request that I review the opinion rendered to the President by my predecessor, holding under the facts as they were then made known to him, that a court-martial was without jurisdiction to try Lather Witcke, alias Pablo Waberski, as a spy. It appears that my predecessor acted upon the assumption that Witcke, who came from Mexico, was a Russian National, and that he was arrested immediately upon setting foot on our territory. You now state that Witcke was a German citizen; had crossed into our territory at least three times within twenty-four hours, and was arrested in the town of Nogales about a mile distant from encampments where were stationed officers and men engaged in protecting the border against threatened invasion from the Mexican side.

In my judgment the above facts, coupled with the further fact that Witcke at the time of his arrest was found "lurking or acting as a spy," conferred jurisdiction upon a court-martial to try him under Article 82 of the Articles of War. Of

course, I do not undertake to determine whether the record evidence warranted his conviction.

This expression of my views should not be treated as overruling the opinion of my predecessor on the facts which were before him, but merely as holding that under the entirely different statement of facts you now submit the principles announced in that opinion have no application.

The circumstances attending this submission of my views lead me to request that they be treated as strictly confidential, and not made public.

The papers which accompanied your letter are herewith returned.

Respectfully.

(Signed) A. MITCHELL PALMER,
Attorney General.

473901A—42——7

U. S. GOVERNMENT PRINTING OFFICE: 1942

BLANK PAGE

SUPREME COURT OF THE UNITED STATES.

Nos. — Original and Nos. 1, 2, 3, 4, 5, 6 and 7—JULY SPECIAL TERM, 1942.

Ex parte Richard Quirin,
Ex parte Herbert Hans Haupt,
Ex parte Edward John Kerling,
Ex parte Ernest Peter Burger,
Ex parte Heinrich Harm Heinck,
Ex parte Werner Thiel,
Ex parte Herman Otto Neubauer.

Motions for leave to file petitions for writs of *habeas corpus*.

The United States of America, *ex rel.* Richard Quirin, Petitioner,
1 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herbert Hans Haupt, Petitioner,
2 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Edward John Kerling, Petitioner,
3 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Ernest Peter Burger, Petitioner,
4 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Heinrich Harm Heinck, Petitioner,
5 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Werner Thiel, Petitioner,
6 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herman Otto Neubauer, Petitioner,
7 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

On writs of certiorari to the United States Court of Appeals for the District of Columbia.

[July 31, 1942.]

PER CURIAM.

In these causes motions for leave to file petitions for habeas corpus were presented to the United States District Court for the

BLANK PAGE

District of Columbia, which entered orders denying the motions. Motions for leave to file petitions for habeas corpus were then presented to this Court, and the merits of the applications were fully argued at the Special Term of Court convened on July 29, 1942. Counsel for petitioners subsequently filed a notice of appeal from the order of the District Court to the United States Court of Appeals for the District of Columbia, and they have perfected their appeals to that court. They have presented to this Court petitions for writs of certiorari before judgment of the United States Court of Appeals for the District of Columbia, pursuant to 28 U. S. C. § 347(a). The petitions are granted. In accordance with the stipulation between counsel for petitioners and for the respondent, the papers filed and argument had in connection with the applications for leave to file petitions for habeas corpus are made applicable to the certiorari proceedings.

The Court has fully considered the questions raised in these cases and thoroughly argued at the bar, and has reached its conclusion upon them. It now announces its decision and enters its judgment in each case, in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.

The Court holds:

(1) That the charges preferred against petitioners on which they are being tried by military commission appointed by the order of the President of July 2, 1942, allege an offense or offenses which the President is authorized to order tried before a military commission.

(2) That the military commission was lawfully constituted.

(3) That petitioners are held in lawful custody, for trial before the military commission, and have not shown cause for being discharged by writ of habeas corpus.

The motions for leave to file petitions for writs of habeas corpus are denied.

The orders of the District Court are affirmed. The mandates are directed to issue forthwith.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.

A true copy.

Test:

Clerk, Supreme Court, U. S.

BLANK PAGE

p 14

SUPREME COURT OF THE UNITED STATES.

Nos. — Original and Nos. 1, 2, 3, 4, 5, 6 and 7—JULY SPECIAL TERM, 1942.

Ex parte Richard Quirin,
Ex parte Herbert Hans Haupt,
Ex parte Edward John Kerling,
Ex parte Ernest Peter Burger,
Ex parte Heinrich Harm Heinck,
Ex parte Werner Thiel,
Ex parte Herman Otto Neubauer.

Motions for leave to file petitions for writs of habeas corpus.

The United States of America, *ex rel.* Richard Quirin, Petitioner,
1 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herbert Hans Haupt, Petitioner,
2 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Edward John Kerling, Petitioner,
3 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Ernest Peter Burger, Petitioner,
4 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Heinrich Harm Heinck, Petitioner,
5 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Werner Thiel, Petitioner,
6 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

The United States of America, *ex rel.* Herman Otto Neubauer, Petitioner,
7 *vs.*
Brig. Gen. Albert L. Cox, U. S. A., Provost Marshal of the Military District of Washington.

On writs of certiorari to the United States Court of Appeals for the District of Columbia.

[October 29, 1942]

Mr. Chief Justice STONE delivered the opinion of the Court.

These cases are brought here by petitioners' several applications for leave to file petitions for habeas corpus in this Court, and by

their petitions for certiorari to review orders of the District Court for the District of Columbia, which denied their applications for leave to file petitions for habeas corpus in that court.

The question for decision is whether the detention of petitioners by respondent for trial by Military Commission, appointed by Order of the President of July 2, 1942, on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States.

After denial of their applications by the District Court, — F. Supp. —, petitioners asked leave to file petitions for habeas corpus in this Court. In view of the public importance of the questions raised by their petitions and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay, we directed that petitioners' applications be set down for full oral argument at a special term of this Court, convened on July 29, 1942. The applications for leave to file the petitions were presented in open court on that day and were heard on the petitions, the answers to them of respondent, a stipulation of facts by counsel, and the record of the testimony given before the Commission.

While the argument was proceeding before us, petitioners perfected their appeals from the orders of the District Court to the United States Court of Appeals for the District of Columbia and thereupon filed with this Court petitions for certiorari to the Court of Appeals before judgment, pursuant to Section 240(a) of the Judicial Code, 28 U. S. C. § 347(a). We granted certiorari before judgment for the reasons which moved us to convene the special term of Court. In accordance with the stipulation of counsel we treat the record, briefs and arguments in the habeas corpus proceedings in this Court as the record, briefs and arguments upon the writs of certiorari.

On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioners' applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the causes would be prepared and filed with the Clerk.

The following facts appear from the petitions or are stipulated. Except as noted they are undisputed.

All the petitioners were born in Germany; all have lived in the United States. All returned to Germany between 1933 and 1941. All except petitioner Haupt are admittedly citizens of the German Reich, with which the United States is at war. Haupt came to this country with his parents when he was five years old; it is contended that he became a citizen of the United States by virtue of the naturalization of his parents during his minority and that he has not since lost his citizenship. The Government, however, takes the position that on attaining his majority he elected to maintain German allegiance and citizenship or in any case that he has by his conduct renounced or abandoned his United States citizenship. See *Perkins* v. *Elg*, 307 U. S. 325, 334; *United States ex rel. Rojak* v. *Marshall*, 34 F. 2d 219; *United States ex rel. Scimeca* v. *Husband*, 6 F. 2d 957, 958; 8 U. S. C. § 801, and compare 8 U. S. C. § 808. For reasons presently to be stated we do not find it necessary to resolve these contentions.

After the declaration of war between the United States and the German Reich, petitioners received training at a sabotage school near Berlin, Germany, where they were instructed in the use of explosives and in methods of secret writing. Thereafter petitioners, with a German citizen, Dasch, proceeded from Germany to a seaport in Occupied France, where petitioners Burger, Heinck and Quirin, together with Dasch, boarded a German submarine which proceeded across the Atlantic to Amagansett Beach on Long Island, New York. The four were there landed from the submarine in the hours of darkness, on or about June 13, 1942, carrying with them a supply of explosives, fuses and incendiary and timing devices. While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.

The remaining four petitioners at the same French port boarded another German submarine, which carried them across the Atlantic to Ponte Vedra Beach, Florida. On or about June 17, 1942, they came ashore during the hours of darkness wearing caps of the German Marine Infantry and carrying with them a supply of explosives, fuses, and incendiary and timing devices. They immediately buried their caps and the other articles mentioned and proceeded in civilian dress to Jacksonville, Florida,

and thence to various points in the United States. All were taken into custody in New York or Chicago by agents of the Federal Bureau of Investigation. All had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government. They also had been paid by the German Government during their course of training at the sabotage school and had received substantial sums in United States currency, which were in their possession when arrested. The currency had been handed to them by an officer of the German High Command, who had instructed them to wear their German uniforms while landing in the United States.[1]

The President, as President and Commander in Chief of the Army and Navy, by Order of July 2, 1942,[2] appointed a Military Commission and directed it to try petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. On the same day, by Proclamation,[3] the President declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempt-

[1] From June 12 to June 18, 1942, Amagansett Beach, New York, and Ponte Vedra Beach, Florida, were within the area designated as the Eastern Defense Command of the United States Army, and subject to the provisions of a proclamation dated May 16, 1942, issued by Lieutenant General Hugh A. Drum, United States Army, Commanding General, Eastern Defense Command (see 7 Federal Register 3830). On the night of June 12-13, 1942, the waters around Amagansett Beach, Long Island, were within the area comprising the Eastern Sea Frontier, pursuant to the orders issued by Admiral Ernest J. King, Commander in Chief of the United States Fleet and Chief of Naval Operations. On the night of June 16-17, 1942, the waters around Ponte Vedra Beach, Florida, were within the area comprising the Gulf Sea Frontier, pursuant to similar orders.

On the night of June 12-13, 1942, members of the United States Coast Guard, unarmed, maintained a beach patrol along the beaches surrounding Amagansett, Long Island, under written orders mentioning the purpose of detecting landings. On the night of June 17-18, 1942, the United States Army maintained a patrol of the beaches surrounding and including Ponte Vedra Beach, Florida, under written orders mentioning the purpose of detecting the landing of enemy agents from submarines.

[2] 7 Federal Register 5103.

[3] 7 Federal Register 5101.

ing or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals".

The Proclamation also stated in terms that all such persons were denied access to the courts.

Pursuant to direction of the Attorney General, the Federal Bureau of Investigation surrendered custody of petitioners to respondent, Provost Marshal of the Military District of Washington, who was directed by the Secretary of War to receive and keep them in custody, and who thereafter held petitioners for trial before the Commission.

On July 3, 1942, the Judge Advocate General's Department of the Army prepared and lodged with the Commission the following charges against petitioners, supported by specifications:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.

The Commission met on July 8, 1942, and proceeded with the trial, which continued in progress while the causes were pending in this Court. On July 27th, before petitioners' applications to the District Court, all the evidence for the prosecution and the defense had been taken by the Commission and the case had been closed except for arguments of counsel. It is conceded that ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally.

While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner. *Walker* v. *Johnston*, 312 U. S. 275, 284. Presentation of the petition for judicial action is the institution of a suit. Hence denial by the district court of leave to file the petitions in these causes was the judicial determination of a case or contro-

versy, reviewable on appeal to the Court of Appeals and reviewable here by certiorari. See *Ex parte Milligan*, 4 Wall. 2, 110-13; *Betts* v. *Brady*, decided June 1, 1942, pp. 2-4.

Petitioners' main contention is that the President is without any statutory or constitutional authority to order the petitioners to be tried by military tribunal for offenses with which they are charged; that in consequence they are entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses. In any case it is urged that the President's Order, in prescribing the procedure of the Commission and the method for review of its findings and sentence, and the proceedings of the Commission under the Order, conflict with Articles of War adopted by Congress—particularly Articles 38, 43, 46, 50½ and 70—and are illegal and void.

The Government challenges each of these propositions. But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission. As announced in our per curiam opinion we have resolved those questions by our conclusion that the Commission has jurisdiction to try the charge preferred against petitioners. There is therefore no occasion to decide contentions of the parties unrelated to this issue. We pass at once to the consideration of the basis of the Commission's authority.

We are not here concerned with any question of the guilt or innocence of petitioners.[4] Constitutional safeguards for the protection of all who are charged with offenses are not to be disre-

[4] As appears from the stipulation, a defense offered before the Military Commission was that petitioners had had no intention to obey the orders given them by the officer of the German High Command.

garded in order to inflict merited punishment on some who are guilty. *Ex parte Milligan, supra,* 119, 132; *Tumey* v. *Ohio,* 273 U. S. 510, 535; *Hill* v. *Texas,* decided June 1, 1942, p. 5. But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress consitutionally enacted.

Congress and the President, like the courts, possess no power not derived from the Constitution. But one of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence". As a means to that end the Constitution gives to Congress the power to "provide for the common Defence", Art. I, § 8, cl. 1; "To raise and support Armies", "To provide and maintain a Navy", Art. I, § 8, cl. 12, 13; and "To make Rules for the Government and Regulation of the land and naval Forces", Art. I, § 8, cl. 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water", Art. I, § 8, cl. 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations", Art. I, § 8, cl. 10. And finally the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Art. I, § 8, cl. 18.

The Constitution confers on the President the "executive Power", Art. II, §1, cl. 1, and imposes on him the duty to "take Care that the Laws be faithfully executed". Art. II, § 3. It makes him the Commander in Chief of the Army and Navy, Art. II, § 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, § 3, cl. 1.

The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.

By the Articles of War, 10 U. S. C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided

for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated or serving with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals". Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.

Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions or naval courts-martial". 50 U. S. C. § 38.

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.[5] By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that mili-

[5] Talbot v. Janson, 3 Dall. 133, 153, 159-61; Talbot v. Seeman, 1 Cranch 1, 40-41; Maley v. Shattuck, 3 Cranch 458, 488; Fitzsimmons v. Newport Ins. Co., 4 Cranch 185, 199; The Rapid, 8 Cranch 155, 159-64; The St. Lawrence, 9 Cranch 120, 122; Thirty Hogsheads of Sugar v. Boyle, 9 Cranch 191, 197-98; The Anne, 3 Wheat. 435, 447-48; United States v. Reading, 18 How. 1, 10; Prize Cases, 2 Black 635, 666-67, 687; The Venice, 2 Wall. 258, 274; The William Bagaley, 5 Wall. 377; Miller v. United States, 11 Wall. 268; Coleman v. Tennessee, 97 U. S. 509, 517; United States v. Pacific R. R., 120 U. S. 227, 233; Juragua Iron Co. v. United States, 212 U. S. 297.

tary tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a militaly commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury. It was upon such grounds that the Court denied the right to proceed by military tribunal in *Ex parte Milligan, supra*. But as we shall show, these petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.

It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. An Act of Congress punishing "the crime of piracy, as defined by the law of nations" is an appropriate exercise of its constitutional authority, Art. I, § 8, cl. 10, "to define and punish" the offense since it has adopted by reference the sufficiently precise definition of international law. *United States* v. *Smith*, 5 Wheat. 153; see *The Marianna Flora*, 11 Wheat. 1, 40-41; *United States* v. *Brig Malek Adhel*, 2 How. 210, 232; *The Ambrose Light*, 25 Fed. 408, 423-28; 18 U. S. C. § 481.[6] Similarly by the reference in the 15th Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions", Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war (compare *Dynes* v. *Hoover*, 20 How. 65, 82), and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations[7] and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces.

[6] Compare 28 U. S. C. § 41(17), conferring on the federal courts jurisdiction over suits brought by an alien for a tort "in violation of the laws of nations"; 28 U. S. C. § 341, conferring upon the Supreme Court such jurisdiction of suits against ambassadors as a court of law can have "consistently with the law of nations"; 28 U. S. C. § 462, regulating the issuance of habeas corpus where the prisoner claims some right, privilege or exemption under the order of a foreign state, "the validity and effect whereof depend upon the law of nations"; 15 U. S. C. §§ 606(b) and 713(b), authorizing certain loans to foreign governments, provided that "no such loans shall be made in violation of international law as interpreted by the Department of State."

[7] Hague Convention No. IV of October 18, 1907, 36 Stat. 2295, Article I of the Annex to which defines the persons to whom belligerent rights and duties attach, was signed by 44 nations. See also Great Britain, War Office, Manual of Military Law (1929) ch. xiv, §§ 17-19; German General Staff, Kriegsbrauch im Landkriege (1902) ch. 1; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law (1922) § 653-54; 2 Oppenheim, International Law (6th ed. 1940) § 107; Bluntschli, Droit International (5th ed. tr. Lardy) §§ 531-32; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) §§ 2034-35.

Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[8] The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals. See Winthrop, Military Law, 2d ed., pp. 1196-97, 1219-21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V.

Such was the practice of our own military authorities before the adoption of the Constitution,[9] and during the Mexican and Civil Wars.[10]

Paragraph 83 of General Order No. 100 of April 24, 1863, directed that: "Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." And Paragraph 84, that "Armed prowlers, by whatever names they may

[8] Great Britain, War Office, Manual of Military Law, ch. xiv, §§ 445-451; Regolamento di Servizio in Guerra, § 133, 3 Leggi e Decreti del Regno d'Italia (1896) 3184; 7 Moore, Digest of International Law, § 1109; 2 Hyde, International Law, §§ 654, 652; 2 Halleck, International Law (4th ed. 1908) § 4; 2 Oppenheim, International Law, § 254; Hall, International Law, §§ 127, 135; Baty & Morgan, War, Its Conduct and Legal Results (1915) 172; Bluntschli, Droit International, §§ 570 bis.

[9] On September 29, 1780, Major John Andre, Adjutant-General to the British Army, was tried by a "Board of General Officers" appointed by General Washington, on a charge that he had come within the lines for an interview with General Benedict Arnold and had been captured while in disguise and travelling under an assumed name. The Board found that the facts charged were true, and that when captured Major Andre had in his possession papers containing intelligence for the enemy, and reported their conclusion that "Major Andre . . . ought to be considered as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death." Major Andre was hanged on October 2, 1780. Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780, printed at Philadelphia in 1780.

[10] During the Mexican War military commissions were created in a large number of instances for the trial of various offenses. See General Orders cited in 2 Winthrop, Military Law (2d ed. 1896) p. 1298, note 1.

During the Civil War the military commission was extensively used for the

be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."[11] These and related pro-

trial of offenses against the law of war. Among the more significant cases for present purposes are the following:

On May 22, 1865, T. E. Hogg and others were tried by a Military Commission, for "violations of the laws and usages of civilized war", the specifications charging that the accused "being commissioned, enrolled, enlisted or engaged" by the Confederate Government, came on board a United States merchant steamer in the port of Panama "in the guise of peaceful passengers" with the purpose of capturing the vessel and converting her into a Confederate cruiser. The Commission found the accused guilty and sentenced them to be hanged. The reviewing authority affirmed the judgments, writing an extensive opinion on the question whether violations of the law of war were alleged, but modified the sentences to imprisonment for life and for various periods of years. Dept. of the Pacific, G. O. No. 52, June 27, 1865.

On January 17, 1865, John Y. Beall was tried by a military commission for "violation of the laws of war". The opinion by the reviewing authority reveals that Beall, holding a commission in the Confederate Navy, came on board a merchant vessel at a Canadian port in civilian dress and, with associates, took possession of the vessel in Lake Erie; that, also in disguise, he unsuccessfully attempted to derail a train in New York State, and to obtain military information. His conviction by the Commission was affirmed on the ground that he was both a spy and a "guerrilla", and he was sentenced to be hanged. Dept. of the East, G. O. No. 14, Feb. 14, 1865.

On January 17, 1865, Robert C. Kennedy, a Captain of the Confederate Army, who was shown to have attempted, while in disguise, to set fire to the City of New York, and to have been seen in disguise in various parts of New York State, was convicted on charges of acting as a spy and violation of the law of war "in undertaking to carry on irregular and unlawful warfare". He was sentenced to be hanged, and the sentence was confirmed by the reviewing authority. Dept. of the East, G. O. No. 24, March 20, 1865.

On September 19, 1865, William Murphy, "a rebel emissary in the employ of and colleagued with rebel enemies" was convicted by a military commission of "violation of the laws and customs of war" for coming within the lines and burning a United States steamboat and other property. G. C. M. O. No. 107, April 18, 1866.

Soldiers and officers "now or late of the Confederate Army", were tried and convicted by military commission for "being secretly within the lines of the United States forces", James Hamilton, Dept. of the Ohio, G. O. No. 153, Sept. 18, 1863; for "recruiting men within the lines", Daniel Davis, G. O. No. 397, Dec. 18, 1863, and William F. Corbin and T. G. McGraw, G. O. No. 114, May 4, 1863; and for "lurking about the posts, quarters, fortifications and encampments of the armies of the United States", although not "as a spy", Augustus A. Williams, Middle Dept., G. O. No. 34, May 5, 1864. For other cases of violations of the law of war punished by military commissions during the Civil War see 2 Winthrop, Military Laws and Precedents (2d ed. 1896) 1310-11.

[11] See also Paragraph 100: "A messenger or agent who attempts to steal through the territory occupied by the enemy to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case."

Compare Paragraph 101.

visions have been continued in substance by the Rules of Land Warfare promulgated by the War Department for the guidance of the Army. Rules of 1914, Par. 369-77; Rules of 1940, Par. 345-57. Paragraph 357 of the 1940 Rules provides that "All war crimes are subject to the death penalty although a lesser penalty may be imposed". Paragraph 8 (1940) divides the enemy population into "armed forces" and "peaceful population", and Paragraph 9 names as distinguishing characteristics of lawful belligerents that they "carry arms openly" and "have a fixed distinctive emblem". Paragraph 348 declares that "persons who take up arms and commit hostilities" without having the means of identification prescribed for belligerents are punishable as "war criminals". Paragraph 351 provides that "men and bodies of men, who, without being lawful belligerents" "nevertheless commit hostile acts of any kind" are not entitled to the privileges of prisoners of war if captured and may be tried by military commission and punished by death or lesser punishment. And Paragraph 352 provides that "armed prowlers . . . or persons of the enemy territory who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads or canals, of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to be treated as prisoners of war". As is evident from reading these and related Paragraphs 345-347, the specified violations are intended to be only illustrative of the applicable principles of the common law of war, and not an exclusive enumeration of the punishable acts recognized as such by that law. The definition of lawful belligerents by Paragraph 9 is that adopted by Article 1, Annex to Hague Convention No. IV of October 18, 1907, to which the United States was a signatory and which was ratified by the Senate in 1909. 36 Stat. 2295. The preamble to the Convention declares:

"Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a

class of unlawful belligerents not entitled to that privilege, including those who though combatants do not wear "fixed and distinctive emblems". And by Article 15 of the Articles of War Congress has made provision for their trial and punishment by military commission, according to "the law of war".

By a long course of practical administrative construction by its military authorities, our Government has likewise recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law[12] that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

Specification 1 of the first charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation.

Specification 1 states that petitioners "being enemies of the United States and acting for . . . the German Reich, a belligerent

---

[12] Great Britain, War Office, Manual of Military Law (1929) § 445, lists a large number of acts which, when committed within enemy lines by persons in civilian dress associated with or acting under the direction of enemy armed forces, are "war crimes". The list includes: "damage to railways, war material, telegraph, or other means of communication, in the interest of the enemy. . . ." Section 449 states that all "war crimes" are punishable by death.

Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroying bridges, war materials, communication facilities etc.; 2 Oppenheim, International Law (6th ed. 1940) § 255; Spaight, Air Power and War Rights (1924) 233; Spaight, War Rights on Land (1911) 110; Phillipson, International Law and the Great War (1915) 208; Liszt, Das Völkerrecht (12 ed. 1925), § 58(B)4; (b) carrying messages secretly: Hall, International Law (8th ed. 1924) § 188; Spaight, War Rights on Land 215; 3 Merignhac, Droit Public International (1912) 296-97; Bluntschli, Droit International Codifié (5th ed. tr. Lardy) § 639; 4 Calvo, Le Droit International Theorique et Pratique (5th ed. 1896) § 2119; (c) ~~for~~ any hostile ~~purpose~~: 2 Winthrop, Military Law and Precedents, (2nd ed. 1896) 1224. Cf. Lieber, Guerrilla Parties (1862), 2 Miscellaneous Writings (1881) 288.

These authorities are unanimous in stating that a soldier in uniform who commits the acts mentioned would be entitled to treatment as a prisoner of war; it is the absence of uniform that renders the offender liable to trial for violation of the laws of war.

enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States . . . and went behind such lines, contrary to the law of war, in civilian dress . . . for the purpose of committing . . . hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States".

This specification so plainly alleges violation of the law of war as to require but brief discussion of petitioners' contentions. As we have seen, entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and warlike act. It subjects those who participate in it without uniform to the punishment prescribed by the law of war for unlawful belligerents. It is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States. Paragraphs 351 and 352 of the Rules of Land Warfare, already referred to, plainly contemplate that the hostile acts and purposes for which unlawful belligerents may be punished are not limited to assaults on the Armed Forces of the United States. Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces. Every consideration which makes the unlawful belligerent punishable is equally applicable whether his objective is the one or the other. The law of war cannot rightly treat those agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies, as any the less belligerent enemies than are agents similarly entering for the purpose of destroying fortified places or our Armed Forces. By passing our boundaries for such purposes without uniform or other emblem signifying their belligent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on

hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war. Cf. *Gates* v. *Goodloe*, 101 U. S. 612, 615, 617-18. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.

Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations. The argument leaves out of account the nature of the offense which the Government charges and which the Act of Congress, by incorporating the law of war, punishes. It is that each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose. The offense was complete when with that purpose they entered—or, having so entered, they remained upon—our territory in time of war without uniform or other appropriate means of identification. For that reason, even when committed by a citizen, the offense is distinct from the crime of treason defined in Article III, § 3 of the Constitution, since the absence of uniform essential to one is irrelevant to the other. Cf. *Morgan* v. *Devine*, 237 U. S. 632; *Albrecht* v. *United States*, 273 U. S. 1, 11-12.

But petitioners insist that even if the offenses with which they are charged are offenses against the law of war, their trial is subject to the requirement of the Fifth Amendment that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that such trials by Article III, § 2, and the Sixth Amendment must be by jury in a civil court. Before the Amendments, § 2 of Article III, the Judiciary Article, had provided: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury", and had directed that "such Trial shall be held in the State where the said Crimes shall have been committed".

Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article, *Ex parte Vallandigham*, 1 Wall. 243;

In re Vidal, 179 U. S. 126; cf. *Williams* v. *United States*, 289 U. S. 553, and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures. As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, *District of Columbia* v. *Colts*, 282 U. S. 63, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article. *Callan* v. *Wilson*, 127 U. S. 540, 549. Hence petty offenses triable at common law without a jury may be tried without a jury in the federal courts, notwithstanding Article III, § 2, and the Fifth and Sixth Amendments. *Schick* v. *United States*, 195 U. S. 65; *District of Columbia* v. *Clawans*, 300 U. S. 617. Trial by jury of criminal contempts may constitutionally be dispensed with in the federal courts in those cases in which they could be tried without a jury at common law. *Ex parte Terry*, 128 U. S. 289, 302-04; *Savin, Petitioner*, 131 U. S. 267, 277; *In re Debs*, 158 U. S. 564, 594-96; *United States* v. *Shipp*, 203 U. S. 563, 572; *Blackmer* v. *United States*, 284 U. S. 421, 440; *Nye* v. *United States*, 313 U. S. 33, 48; see *United States* v. *Hudson and Goodwin*, 7 Cranch, 32, 34. Similarly, an action for debt to enforce a penalty inflicted by Congress is not subject to the constitutional restrictions upon criminal prosecutions. *United States* v. *Zucker*, 161 U. S. 475; *United States* v. *Regan*, 232 U. S. 37 and cases cited.

All these are instances of offenses committed against the United States, for which a penalty is imposed, but they are not deemed to be within Article III, § 2 or the provisions of the Fifth and Sixth Amendments relating to "crimes" and "criminal prosecutions". In the light of this long-continued and consistent interpretation we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.

The fact that "cases arising in the land or naval forces" are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth. *Ex parte Milligan, supra,* 123, 138-39. It is argued that the exception, which excludes from the Amendment cases arising in the armed forces, has also by implication extended its guaranty to all other cases; that since petitioners, not being members of the Armed Forces of the United States, are not within the exception, the Amendment operates to give to them the right to a jury trial. But we think this argument misconceives both the scope of the Amendment and the purpose of the exception.

We may assume, without deciding, that a trial prosecuted before a military commission created by military authority is not one "arising in the land . . . forces", when the accused is not a member of or associated with those forces. But even so, the exception cannot be taken to affect those trials before military commissions which are neither within the exception nor within the provisions of Article III, § 2, whose guaranty the Amendments did not enlarge. No exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms. An express exception from Article III, § 2, and from the Fifth and Sixth Amendments, of trials of petty offenses and of criminal contempts has not been found necessary in order to preserve the traditional practice of trying those offenses without a jury. It is no more so in order to continue the practice of trying, before military tribunals without a jury, offenses committed by enemy belligerents against the law of war.

Section 2 of the Act of Congress of April 10, 1806, 2 Stat. 371, derived from the Resolution of the Continental Congress of August 21, 1776,[18] imposed the death penalty on alien spies "according to the law and usage of nations, by sentence of a general court martial". This enactment must be regarded as a contemporary construction of both Article III, § 2, and the Amendments as not foreclosing trial by military tribunals, without a jury, of offenses against the law of war committed by enemies not in or associated with our Armed Forces. It is a construction of the Constitution which has been followed since the founding of our

[18] See Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 107-09.

government, and is now continued in the 82nd Article of War. Such a construction is entitled to the greatest respect. *Stuart* v. *Laird*, 1 Cranch 299, 309; *Field* v. *Clark*, 143 U. S. 649, 691; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 328. It has not hitherto been challenged, and so far as we are advised it has never been suggested in the very extensive literature of the subject that an alien spy, in time of war, could not be tried by military tribunal without a jury.[14]

The exception from the Amendments of "cases arising in the land or naval forces" was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different—to authorize the trial by court martial of the members of our Armed Forces for all that class

[14] In a number of cases during the Revolutionary War enemy spies were tried and convicted by military tribunals: (1) Major John Andre, Sept. 29, 1780, see note 9 *supra*. (2) Thomas Shanks was convicted by a "Board of General Officers" at Valley Forge on June 3, 1778, for "being a Spy in the Service of the Enemy" and sentenced to be hanged. 12 Writings of Washington (Bicentennial Comm'n ed.) 14. (3) Matthias Colbhart was convicted of "holding a Correspondence with the Enemy" and "living as a Spy among the Continental Troops" by a General Court Martial convened by order of Major General Putnam on Jan. 13, 1778; General Washington, the Commander in Chief, ordered the sentence of death to be executed, 12 *Id.* 449-50. (4) John Clawson, Ludwick Lasick, and William Hutchinson were convicted of "lurking as spies in the Vicinity of the Army of the United States" by a General Court Martial held on June 18, 1780. The death sentence was confirmed by the Commander in Chief. 19 *Id.* 23. (5) David Farnsworth and John Blair were convicted of "being found about the Encampment of the United States as Spies" by a Division General Court Martial held on Oct. 8, 1778 by order of Major General Gates. The death sentence was confirmed by the Commander in Chief. 13 *Id.* 139-40. (6) Joseph Bettys was convicted of being "a Spy for General Burgoyne" by coming secretly within the American lines, by a General Court Martial held on April 6, 1778 by order of Major General McDougall. The death sentence was confirmed by the Commander in Chief. 15 *Id.* 364. (7) Stephen Smith was convicted of "being a Spy" by a General Court Martial held on Jan. 6, 1778. The death sentence was confirmed by Major General McDougall. *Ibid.* (8) Nathaniel Aherly and Reuben Weeks, Loyalist soldiers, were sentenced to be hanged as spies. Proceedings of a General Court Martial Convened at West Point According to a General Order of Major General Arnold, Aug. 20-21, 1780 (National Archives, War Dept., Revolutionary War Records, MS No. 31521). (9) Jonathan Loveberry, a Loyalist soldier, was sentenced to be hanged as a spy, Proceedings of a General Court Martial Convened at the Request of Major General Arnold at the Township of Bedford, Aug. 30-31, 1780 (*Id.* MS No. 31523); he later escaped, 20 Writings of Washington 253n. (10) Daniel Taylor, a lieutenant in the British Army, was convicted as a spy by a general court martial convened on Oct. 14, 1777, by order of Brigadier General George Clinton, and was hanged. 2 Public Papers of George Clinton (1900) 443. (11) James Molesworth was convicted as a spy and sentenced to death by a general court martial, held at Philadelphia, March 29, 1777; Congress confirmed the order of Major General Gates for the execution of the sentence. 7 Journals of the Continental Congress 210. See also cases of

of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in the civil courts. The cases mentioned in the exception are not restricted to those involving offenses against the law of war alone, but extend to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law. *Ex parte Mason*, 105 U. S. 696; *Kahn* v. *Anderson*, 255 U. S. 1, 8-9; *cf. Caldwell* v. *Parker*, 252 U. S. 376.

Since the Amendments, like § 2 of Article III, do not preclude all trials of offenses against the law of war by military commission without a jury when the offenders are aliens not members of our Armed Forces, it is plain that they present no greater obstacle to the trial in like manner of enemy citizens who have violated the law of war applicable to enemies. Under the original statute authorizing trial of alien spies by military tribunals, the offenders were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal.

"M. A." and "D. C.", G. O. Headquarters of General Sullivan, Providence, R. I., July 24, 1778, reprinted in Niles, Principles and Acts of the Revolution (1822) 369; of Lieutenant Palmer, 9 Writings of Washinton, 56n; of Daniel Strang, 6 *Id.* 497n; of Edward Hicks, 14 *Id.* 357; of John Mason and James Ogden, executed as spies near Trenton, N. J., on Jan. 10, 1781, mentioned in Hatch, Administration of the American Revolutionary Army (1904) 135 and Van Doren, Secret History of the American Revolution (1941) 410.

During the War of 1812, William Baker was convicted as a spy and sentenced to be hanged by a general court martial presided over by Brigadier General Thomas A. Smith at Plattsburg, N. Y., on March 25, 1814. (National Archives, War Dept., Judge Advocate General's Office, Records of Courts Martial, MS No. O-13). William Utley, tried as a spy by a court martial held at Plattsburg, March 3-5, 1814, was acquitted (*Id.*, MS No. X-161). Elijah Clark was convicted as a spy, and sentenced to be hanged, by a general court martial held at Buffalo, N. Y., Aug. 5-8, 1812; he was ordered released by President Madison on the ground that he was an American citizen. Military Monitor, Vol. I, No. 23, Feb. 1, 1813, pp. 121-122; Maltby, Treatise on Courts Martial and Military Law (1813) 35-36.

In 1862 Congress amended the spy statute to include "all persons" instead of only aliens. 12 Stat. 339, 340; see also 12 Stat. 731, 737. For the legislative history, see Morgan, Court-Martial Jurisdiction over Non-Military Persons under the Articles of War, 4 Minnesota L. Rev. 79, 109-11. During the Civil War a number of Confederate officers and soldiers found within the Union lines in disguise were tried and convicted by military commission for being spies. Charles H. Clifford, G. O. No. 135, May 18, 1863; William S. Waller, G. O. No. 269, Aug. 4, 1863; Alfred Yates and George W. Casey, G. O. No. 382, Nov. 28, 1863; James R. Holton and James Taylor, G. C. M. O. No. 93, May 13, 1864; James McGregory, G. C. M. O. No. 152, June 4, 1864; E. S. Dodd, Dept. of Ohio, G. O. No. 3, Jan. 5, 1864. For other cases of spies tried by military commission see 2 Winthrop, Military Law and Precedents, 1193 *et seq.*

We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments—whose primary purpose was to continue unimpaired presentment by grand jury and trial by petit jury in all those cases in which they had been customary—as either abolishing all trials by military tribunals, save those of the personnel of our own armed forces, or what in effect comes to the same thing, as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury. We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury.

Petitioners, and especially petitioner Haupt, stress the pronouncement of this Court in the *Milligan* case, p. 121, that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed". Elsewhere in its opinion, at pp. 118, 121-22 and 131, the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.

The Court's opinion is inapplicable to the case presented by the present record. We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of

military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Since the first specification of Charge I set forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional. *McNally* v. *Hill*, 293 U. S. 131.

There remains the contention that the President's Order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50½ and 70. Petitioners argue that their trial by the Commission, for offenses against the law of war and the 81st and 82nd Articles of War, by a procedure which Congress has prohibited would invalidate any conviction which could be obtained against them and renders their detention for trial likewise unlawful (see *McClaughry* v. *Deming*, 186 U. S. 49; *United States* v. *Brown*, 206 U. S. 240, 244; *Runkle* v. *United States*, 122 U. S. 543, 555-56; *Dynes* v. *Hoover*, 20 How. 65, 80-81); that the President's Order prescribes such an unlawful procedure; and that the secrecy surrounding the trial and all proceedings before the Commission, as well as any review of its decision, will preclude a later opportunity to test the lawfulness of the detention.

Petitioners do not argue and we do not consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to discliplinary measures. Their contention is that, if Congress has authorized their trial by military commission upon the charges preferred—violations of the law of war and the 81st and 82nd Articles of War—it has by the Articles of War prescribed the

procedure by which the trial is to be conducted; and that since the President has ordered their trial for such offenses by military commission, they are entitled to claim the protection of the procedure which Congress has commanded shall be controlling.

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.